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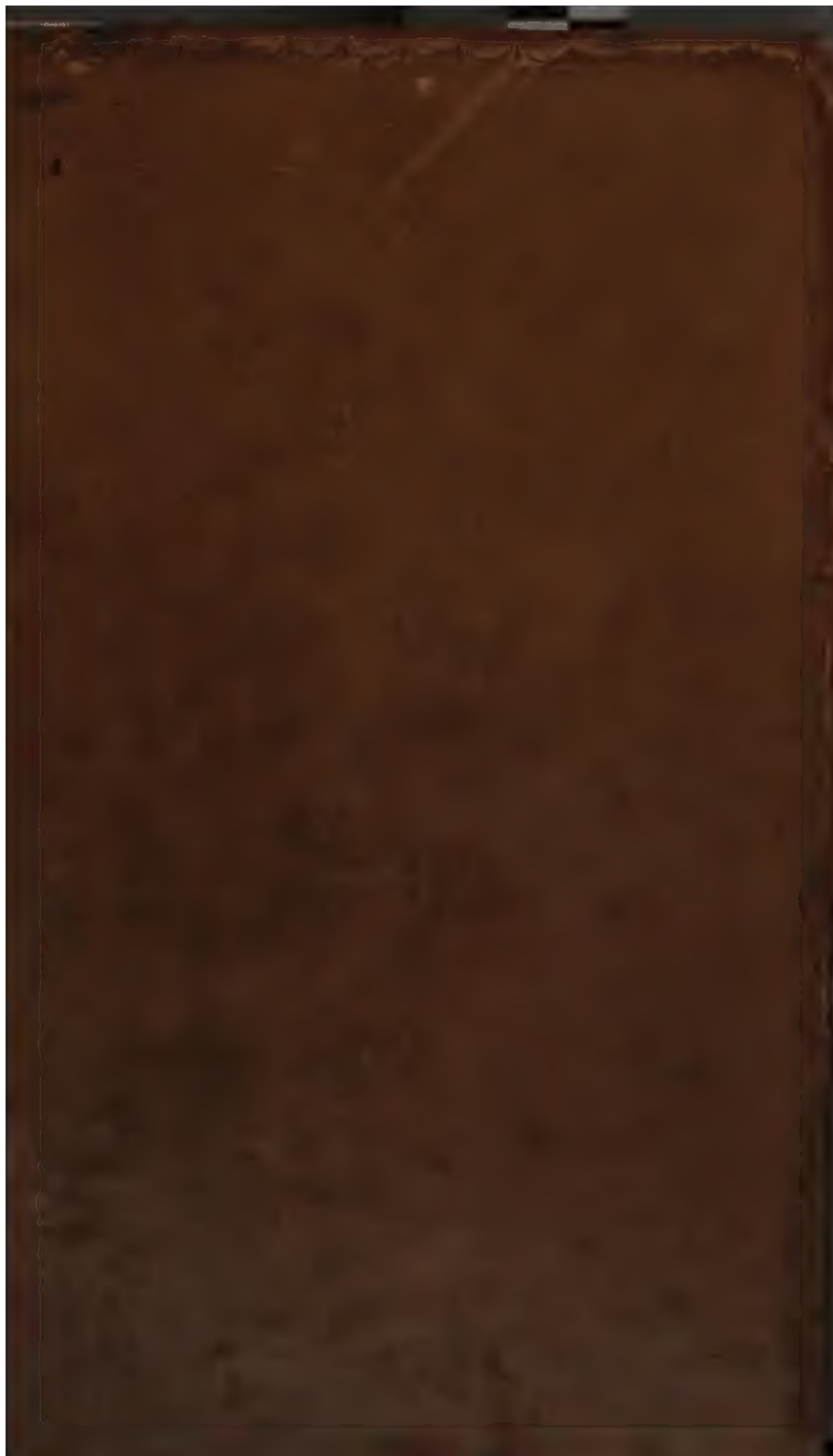
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R E P O R T S

OF

CASES,

DETERMINED

AT NISI PRIUS,

IN THE COURTS OF

KING'S BENCH AND COMMON PLEAS,

AND ON THE CIRCUIT,

FROM THE

Sittings after MICHAELMAS TERM, 57 GEO. III. 1816.

TO THE

Sittings after MICHAELMAS TERM, 60 GEO. III. 1819.

INCLUSIVE.

By THOMAS STARKIE, ESQUIRE,

OF LINCOLN'S INN, BARRISTER AT LAW.

Verum
Credite me vobis folium recitare Sibyllæ.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, 43. FLEET-STREET, AND

J. AND W. T. CLARKE, PORTUGAL-STREET.

1820.



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ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

*At the Sitzings after Michaelmas Term,
57 GEORGE III.*

SITTINGS AFTER TERM AT GUILDHALL.

WILSON v. MILLAR and Others.

1816.

THIS was an action on the case brought by the plaintiff, the freighter of goods, against the defendants, the ship-owners and captain, for having improperly sold a cargo of goods entrusted to them. The declaration contained also a count in trover.

The plaintiff having an establishment at *Goree* and *Senegal*, had shipped on board the defendants' ship, the *Hope*, a cargo of goods, consisting of crates, earthen wares, blues from *India*, and other commodities, amounting to 14,000*l*. According to the terms of the charter-party, the ship was to proceed to such ports or places on the coast of

December.
A captain of a ship is not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale of the goods is the most beneficial course for the owner.

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WILSON

v.

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and Others.

Africa as the freighter should direct, and should there receive on board such lading as the freighter should direct, and proceed therewith to the port of *London*. *Paterson*, the captain, had received a bill of lading to deliver the cargo at the ports of *Senegal* and *Goree* to *William Waterland*. After the *Hope* had proceeded for some time upon her voyage she was captured by an *American* privateer, which plundered her of half the cargo. Seven or eight *American* seamen were then put on board, who rummaged the hold for porter, doing considerable mischief to the cargo, and remained in possession several weeks. The vessel was saved by means of *Paterson* the master, who prevailed upon the *Americans* to allow the vessel to be carried to *Bermuda*, under an engagement that they should not be considered as prisoners of war. Upon entering the port of *Bermuda* the *Hope* fell in with a *British* ship of war, the *Ganymede*, who sent men on board who took her into the harbour. The captain and crew of the *Ganymede* afterwards claimed salvage, and had one-sixteenth decreed to them. Upon the arrival of the vessel at *Bermuda*, the sails had been destroyed, and the water let in; the boats, which are essential to an *African* voyage, had been taken away, and none could be built in less than three months. The cargo consisting of perishable commodities, and the captain not being able to procure seamen, he considered it to be impossible to prosecute the original voyage: he sold the remaining cargo, and transmitted the product to the owner.

Scarlett,

Scarlett, for the defendants, contended, that under these circumstances the plaintiff was not entitled to recover. He could not recover on the counts which charged the defendants as common carriers; because for any damage arising from the act of God, or of the King's enemies, they were not liable in that capacity. When the original intention of the voyage had been entirely frustrated, the question was what was to be done; and the sale of the goods was the most beneficial course that could have been pursued. Some of the counts charged, that the defendants had not proceeded to the coast of *Africa*: the answer was, that it was impossible for them to proceed. There was also a count in trover: but the master could not have been guilty of a conversion of the goods when he sold them to the best of his judgment; and that at all events the plaintiff could proceed on the last count only against the captain alone; since if he had been guilty of a conversion in disposing of the goods, this could not affect the owners of the ship, who had not concurred with him in the tortious act. It had been held by Sir *W. Scott*, that the captain was the agent for all parties.

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 WILSON
 v.
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LORD ELLENBOROUGH. — I think you had no right to determine the voyage and make a general sale of the cargo. Nothing but extreme necessity will warrant the master in making a sale of any part of the cargo; but here he took upon himself to break up the destination of the adventure, and

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WILSON

v.

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and Others.

to exercise a full dominion by the sale of the whole of the goods. I do not say that even extreme necessity would have warranted the master in selling the whole. He might have raised something by way of hypothecation, sufficient probably to defray the expences of salvage; but he is absolutely a stranger to the dominion over the ship and goods, and is bound to send back to receive the further directions of the owner, although the consequence may not be so beneficial to the latter. To allow the master such an unlimited dominion as is contended for would tend to the destruction of all commercial adventures. How could such a defence be put upon the record as a justification? The owners certainly cannot be responsible for the uncommunicated act of the captain, which they could neither approve of nor repudiate, for the negligence they are equally liable, but the conversion was his solitary act.

Verdict for the plaintiff.

The Attorney General, Topping, Richardson, and Spankie, for the plaintiff.

Scarlett, Marryatt, and West, for the defendants.

In the ensuing term, *Scarlett* moved for a rule to shew cause why the verdict should not be set aside, and a new trial had. He cited the case of *Reid v. Darby* (a), and that of *Haynmer v. Malton* (b), where it had been laid down to the jury,

(a) 10 East, 143.

(b) 5 Esp. 65.

that

that although the captain had no general authority to sell, yet he had an implied authority in extreme cases to act for the best, and even in cases of extremity to sell the goods. That from the nature of the goods in this case, they could not have been brought back, since they were contraband. —

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 WILSON
 v.
 MILLAR
 and Others.

But the Court were of opinion, that an option ought to have been given to the party in England to choose another market for the sale of his goods :

And ABBOTT, J. added — The proprietor of goods will seldom complain where the master has exercised an honest discretion on the subject. In the West Indies there is a set of people whose interest it is to put an end to commercial adventures ; and instances have occurred of the sale of vessels as wrecks, where they might have been repaired at a small expence.

Rule refused.

See *Abbott*, part i. c. 1. s. 2.

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER.

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APPLETON v. Lord BRAYBROOK.

A copy of a judgment in the Supreme Court of Jamaica, made by the chief clerk of the court, is not receivable in evidence here, although it appears that such copies are usually received as evidence in the island of Jamaica.

THIS was an action against the defendant upon a judgment recovered in the Court of the island of *Jamaica*. The principal question was, whether the judgment had been properly authenticated.

It was proposed to authenticate the judgment in the following manner. First, to shew, by a certificate of the governor, under the great seal of the island, that *Clayton* was a notary public and secretary of the island. Secondly, to prove, by a certificate of *Clayton* the notary public, that *Smith* was clerk of the Supreme Court. And, thirdly, by producing an instrument which purported to be a copy of a judgment under the hand of the chief clerk.

A witness of the name of *Allen* proved, that he had practised as an attorney on the island many years, and that the Court had no seal; but that copies of the judgments on stamps were usually received, certified to be true copies by *Smith* the chief clerk. But he could not state, whether the document produced was in the hand-writing of *Smith*, or of one of his clerks.

Gaselee,

AFTER MICHAELMAS TERM, 57 GEORGE III.

Gaselee, for the defendant, objected, that it did not appear upon the evidence that the document was in the hand-writing of *Smith*.

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Lord ELLENBOROUGH permitted the plaintiff to take a verdict, with liberty to the defendant to move to have a nonsuit entered.

Scarlett and *Tindal* for the plaintiff.

Gaselee for the defendant.

The Court, in the ensuing term, granted a rule nisi for entering a nonsuit. (a)

(a) This and the next case afterwards came on for argument at Serjeant's-Inn at the Sittings before Hilary Term, 1817, at the same time. See the next case.

BLACK v. LORD BRAYBROOK.

THIS was an action brought against the defendant on a judgment obtained in the Supreme Court of the island of *Jamaica*.

In order to establish the judgment, the plaintiff gave in evidence, First, a certificate by the governor under the seal of the island, that *G. Clayton* was a secretary of the island and notary public. Secondly, a certificate by *Clayton*, as notary public, that *Adam Dolnage* Esquire, was

See the last marginal note. Action on judgment for the non-performance of certain promises and undertakings. From the record in the former action it appears that the judgment was for the

non-performance of one promise only. Qu. Whether this is a fatal variance.

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clerk of the Court, *January* 13, 1815. Thirdly, a document purporting to be a copy of a judgment in the Supreme Court of the island, under the seal of *Adam Dolnage*. It was also proved, that the clerk of the Court had no regular seal of office ; and that the alleged copy was in the handwriting of *Charles Stuart*, who was in the habit of writing all such documents, and who was the clerk of *Dolnage* ; and that *Dolnage* was the nominal clerk of the Court in the absence of *Smith*. It appeared also, that a new practice had lately been adopted, and that *Smith*, the chief clerk, had taken out with him a seal, to be used, in future, as the seal of the Court.

It was objected, that this was not a sufficient authentication of the judgment, and an objection was also taken, on the ground of a variance between the declaration in the present action, and the judgment.

The declaration stated the judgment to be for the damages which the plaintiff had sustained, by reason of the non-performance of certain promises and undertakings (in the plural) by the said Lord *Braybrook*. But the declaration in the original action contained but one count, in assumpsit, for money had and received, and interest, alleging but one promise to pay both.

Jervis, for the plaintiff, answered, that there were two promises in law, to pay the principal money had and received, and to pay the interest.

Lord

LORD ELLENBOROUGH. — The considerations are several, but the promise, in fact, is but one. I will not, however, turn the plaintiff round upon this objection; since there is another point, they may as well be considered together. (a)

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Verdict for the plaintiff.

Jervis and *Erskine* for the plaintiff.

Gaselee for the defendant.

The last two cases came on for argument at the same time.

In the former cause, it was admitted on the part of the plaintiff, that it would have been better if the seal of the island had been affixed to the judgment instead of being affixed merely to the certificate that *Clayton* was the secretary and notary public. But still, that the evidence was sufficient, since the judgment was authenticated by the hand-writing of a clerk in the office, if it was not in the hand-writing of *Smith* the chief clerk himself; and that, supposing the certificate to be entirely out of the question, the copy was sufficiently authenticated, since it was in the hand-writing of a clerk in the office, who was authorized to exemplify judgments. It came to the question, whether that which was proved to be the usual mode of exemplification was

(a) In the case of *Baynes v. Forrest*, Str. 892. Upon the issue of *nul tiel* record, the *scire facias* recited a judgment for damage, *pro non-performance cujusdam promissionis & assumptionis*; and on producing the record, it was several promises and entire damages. And the Court held it a variance; and the plaintiff quashed his *scire facias* with costs, the Court refusing to amend it.

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sufficient. That the law recognized two sorts of office copies, one species of which being made by the officer who has the custody of the records, are receivable in the same Court only, and another made by an accredited officer appointed by the law to make copies ; and that it was sufficient in this case to show, that *Smith*, the chief clerk, had been clothed with that authority. For this distinction, *Gilbert. Ev.* 23. was cited. That it frequently happens, that the officer himself does not sign the document, but only his clerk or deputy, such is the case in the office of under-sheriff, the law giving credit to the office.

In the latter case, (*Black v. Lord Braybrook*,) it was contended, that it was, at all events, distinguishable from the former, since the copy was in the hand-writing of *Stuart*, who had been proved to have acted for *Dolnage*, principal clerk, and to have been in the habit of signing official documents. That the copy might be considered as a *quasi* exemplification ; and the case of 9 *Mod.* 66. was referred to, where it was held that an exemplification of a sentence in *Holland*, under the common seal of the States, was evidence, without any further proof of such sentence. That the case of *Henry v. Adey* (a), was very distinguishable from the present, since there a seal, purporting to be the seal of the court, was affixed, but was not proved to be the seal of the court. That admitting that the copy was not an exemplification, still it was to be considered as the authentication of an accredited officer, according to the usual mode

(a) 3 *East.* 221.

of authenticating judgments in that court. That although for want of a seal the court could not authenticate the act of the officer in the usual way, still it might be shown to be the act of the Court by other means. That according to the distinction taken, *Buller. N.P. 229.* this copy was admissible since it was shown to have been made according to the usual course, and was therefore on the same footing with the chirograph of a fine made by an officer whom the law authorized to make copies.

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LORD ELLENBOROUGH. — I entertain no doubt that this copy is inadmissible. It has been admitted, that it is the mere authenticated copy of the officer, and not an exemplification. Is there any instance where the Courts have regarded such an instrument as receivable in evidence? An exemplification under the seal of the Court is certainly admissible; but it is argued, that because there is no seal of court, this is to be considered as an exemplification. But it is, in fact, in the nature of an office copy, and it has not been proved, that the practice of receiving such copies in evidence, has ever extended beyond the limits of the island; such proof is indispensably necessary to show that an instrument in this form is admissible here. If, for want of a seal, the document cannot be clothed in the same form with legal exemplifications, it must be proved to possess some requisites to entitle it to credit. On account of the great distance of this island, it would be of enormous inconvenience to relax the rule of evidence. Office copies of this nature

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nature may be receivable in the island in the same manner as office copies are receivable here, where a question arises in the same court, but which would not be admissible in any other court. It does not appear that any Court beyond the limits of the island has given credit to such a document, and it would be very dangerous to relax the rules of evidence.

BAYLEY, J. — If this copy had been authenticated under the seal of the island, I think it would have been admissible ; but that seal is attached to the certificate only, that a certain person is a notary public, and the certificate of the notary public is not on oath, and therefore is out of the question. Mr. *Erskine* has put the question on the proper ground, that it is the act of an officer appointed to authenticate copies, but the facts do not support the position. There are some officers whose duty it is to deliver out copies, and who have not discharged their duty until they have delivered out copies to persons whose title is concerned. The chirographer of a fine, till this is done, has not performed his duty. There is a distinction between such acts and the making copies of records by an officer who has the custody of them. In *Buller's Nisi Prius*, 229., after mention has been made of those officers who are appointed to attest copies, it is said, that it is not sufficient to give in evidence a copy of a judgment, though it be examined by the Clerk of the Treasury, because it is no part of the necessary office of such clerk, for he is entrusted

trusted only to keep the records for the benefit of all men's perusal, and not to make out copies of them. And therefore the receiving authenticated copies in evidence must be confined to cases where the officer would not have performed his duty until he had delivered out a copy of the record.

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ABBOTT, J. — The seal of the governor in this case is not material, for it has no reference to the copy of the judgment, but only specifies that a particular person is a notary public. If it appeared clearly that the officer was in the habit of making out copies which were received as evidence by the Court in *Jamaica*, it could not be extended by analogy to make them receivable here, were it even proved that the officer had certified that the copy was a true one, of which there is no evidence. The chirographer of fines delivers out the copy as part of the title deeds; he is the officer entrusted by the law for that purpose, but those officers who are entrusted with the custody of records, cannot verify them by an office copy, and it is not reasonable that greater effect should be allowed to the office copy of an officer of a foreign court.

HOLROYD, J. — The distinction is between those copies which it is the duty of the officer to make, and those which he is authorized by the Court to make. It is clear, that office copies of the proceedings and depositions in chancery, made by an officer of the court, where it is not a part of his duty to make such office copies, are receivable in evidence

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evidence in the Court of Chancery, but not by common law without examination, *Buller's Nisi Prius*, 229. Therefore, an officer is allowed to make out office copies which are receivable in the same court without further proof, but which would not be accredited in other courts. Then how can a copy, authenticated by the officer of a foreign court, receive greater credit here? Where an exemplification is under the seal of the Court, and shown to be the act of the Court, credit is given to that act, and the only equivalent for such authentication is, where the officer, in making a copy, does that which by law he is required to do. The officer, in this case, was not so required by law, there is nothing equivalent to the seal of the Court, and consequently, the evidence is inadmissible.

See *Alves v. Bunbury*, 4 Camp. 28. *Henry v. Adey*, 3 East. 221.
Bull. N. P. 229. 9 Mod. 66.

The Mayor, Commonalty, and Citizens of the
City of LONDON v. BRANDON.

It is not a breach of the bond of a broker in the City of London to act as a broker concurrently with another.

THIS was an action of debt upon a bond brought by the Mayor, Commonalty, and Citizens, of the City of *London*, to recover from the defendant, a sworn broker, the penalty of 500*l.* upon several suggested breaches of his broker's bond.

A great many breaches were assigned; the breach upon which the principal question arose, was upon

a clause in the condition, which required, that the obligor should not employ any person under him to act as a broker within the City of *London*, who had not been duly admitted as a broker.

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In order to prove a breach of this part of the condition, witnesses were called, who proved that the defendant and his brother, *Joshua Brandon*, carried on business as brokers under the name and firm of *Brandon and Sons*; that *Joshua Brandon* frequently made contracts without any communication with his brother, the defendant, in the first instance; but that the transactions were considered as with both, and that the contracts were made out in the joint names. And it was contended, on the part of the plaintiffs, that if the brother *Joshua Brandon* made contracts, which the defendant afterwards recognized by taking brokerage in respect of such contracts, he did in fact employ a sub-broker, contrary to the terms of the condition.

LORD ELLENBOROUGH. — Both may have acted illegally; but the question is, whether the one acted *under* the other. The brother did not act *under* the defendant, but concurrently and with equal authority. If you could make out a case where *Joshua Brandon* alone made the contract, and where the defendant alone acted as broker, that would be a breach of the condition. Their course of dealing is within the mischief intended to be prevented, but it is not provided against by the form of the bonds; to embrace this case the words should

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should have been “ acting under him, or concurrently with him.”

Plaintiffs nonsuited.

The *Attorney General*, *Topping*, and *Parke*, for the plaintiffs.

Scarlett and *Gaselee* for the defendants.

In the ensuing term, the *Attorney General* moved to set aside the nonsuit, on the ground that there was evidence to show a breach of the part of the condition cited above. When the defendant entered into that stipulation, he virtually undertook that the parties should have all the benefit of his skill and integrity, and not to employ any one else to do what he alone legally ought to do. On the contrary, he had sent out his brother to make contracts for him in the name of the firm ; and consequently he had not the exclusive means of doing what the bond held out.

LORD ELLENBOROUGH. — I was of opinion at the trial, that the brother did not act under him, but co-ordinately with him. The terms of the condition ought to be enlarged.

Rule refused.

HARVEY and Others, Assignees of J. W. HARVEY,
a Bankrupt, v. MORGAN and Another.

1816.

THIS was an action of assumpsit, brought by the plaintiffs, as the assignees of *John Whittle Harvey*, a bankrupt, to recover the sum of 500*l.* as money had and received to their use.

The plaintiffs were the assignees of *J. W. Harvey* and *M. B. Harvey*, under a joint commission; and they sought to recover the sum of 500*l.* as money paid by *J. W. Harvey*, before his bankruptcy, to put an end to a prosecution which had been instituted against him for perjury. The plaintiffs were described in the declaration, as the assignees of *J. W. Harvey* simply.

Topping for the defendant objected, that since there was but one commission, and that a joint one, and but one assignment to the plaintiffs by the provisional assignee, they were improperly described as the assignees of *J. W. Harvey* alone.

LORD ELLENBOROUGH. — They are the assignees of both, but they are also the assignees of each, and since they claim in respect of one only, it is unnecessary for them to go further, and describe themselves as the assignees of both.

It appeared that the defendants had prosecuted *J. W. Harvey* for perjury, alleged to have been

this is insufficient, although A. and B. are, in fact, the assignees of C. and D.

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committed

The assignees under a joint commission against A. and B., may, in an action to recover a debt due to A. alone, describe themselves in the declaration as the assignees of A. alone.

Money paid in consideration of putting off the trial of a party upon an indictment for perjury, for which he is not prepared, cannot be recovered by his assignees, after he has become a bankrupt, from the prosecutors.

In an action by the plaintiffs, A. and B., as the assignees of C. v. E., a notice to produce a document is entitled, A. and B., assignees of C. and D. v. E.

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committed by him in his deposition as a creditor under a commission of bankrupt, taken out against *Kendall* and *Reynolds*, and that *J. W. Harvey* being unprepared for his trial, had made an application, but that the defendants had refused to put off the trial, unless *J. W. Harvey* would pay the sum of 500*l.*, and would also pay the sum of 4000*l.*, a verdict to that amount having been recovered against *D. W. Harvey*, the brother of *J. W. Harvey*, in an action, at the suit of the present plaintiffs, for usury; and that *J. W. Harvey* being wholly unprovided with the means of defence, had on the very morning when the trial was to have taken place, agreed to pay down the sum of 500*l.*, and also the amount of the verdict recovered against *D. W. Harvey*.

LORD ELLENBOROUGH was of opinion, that if the money was paid, as according to the evidence then adduced, it appeared to have been, not for the purpose of putting an end to the prosecution, but merely as a consideration for putting off the trial, it was not to be considered as an illegal and corrupt agreement.

The plaintiffs proposed to go into further evidence, in order to shew that the real object of the parties was to put an end to the prosecution altogether, and that the agreement for delaying the trial was a mere pretence, and they required the defendants to produce a written agreement which had been entered into between the parties, and
 proceeded

proceeded to prove that the defendants had been served with notice to produce the agreement. Upon the production of the notice, a copy of which had been served, it appeared to be entitled in the cause, “ *Harvey and Others, Assignees of “ J. W. Harvey and M. B. Harvey, Bankrupts, “ against Morgan and Another ;”* and it was objected, that this notice was a nullity, since the proper title of the present action was “ *Harvey and “ Others, Assignees of J. W. Harvey, a Bank- “ rupt,” &c.*

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The *Attorney-General* for the plaintiffs, contended, that this notice was sufficient, since it could not fail to apprize the defendants of that which they were required to produce ; and that if there had been no title whatsoever, it still would have been sufficient.

Lord ELLENBOROUGH was of opinion, that the notice was insufficient, and —

The plaintiffs were nonsuited.

The *Attorney-General* and *Marryatt* for the plaintiffs.

Topping and *Lawes* for the defendants.

In the ensuing term, the *Attorney-General* moved for a new trial, on the ground that the notice proved was sufficient to entitle the plaintiffs to give parol evidence of the agreement, in default of its

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production by the defendants. The plaintiffs being the assignees of *J. W. Harvey* and *M. B. Harvey*, were entitled to sue as the assignees of either, the notice had described them as the assignees of the joint estate, and so, in fact, they were, although they had brought the present action as the assignees of *J. W. Harvey* only. That a notice does not require the technical accuracy of a plea; and that great mischief would result from too strict a rule. That no mischief, on the contrary, could result from allowing such a notice to be sufficient, since there was no other cause in court between the same parties; it was impossible, therefore, that the defendants could have been misled. Suppose the plaintiffs had been described by their names only, could it be said that a sufficient communication had not been made.

The Court threw out an intimation, that since *J. W. Harvey* could not have recovered this money, his assignees could not be in a better situation; and, upon the whole, held that the notice was insufficient, and the action not maintainable.

GRAHAM and Others v. DYSTER.

1816.

THIS was an action brought to recover the value of a quantity of hides which had been sold by the defendant, under the following circumstances.

The hides in question had been consigned by the plaintiffs, who resided at *Bahia*, to *Battye and Pilgrim*, who were brokers, in *July*, 1810, to be dealt with according to their discretion. Soon after this consignment, the plaintiffs drew upon *Battye and Pilgrim*, three bills of exchange for 750*l.* each, on the account of these hides, which would become due on the 27th of *October* and 9th of *November*, and which *Battye and Co.* accepted, and which would, if the bankruptcy of *Battye and Co.* had not afterwards intervened, have been cash in their hands to the amount of the hides. The defendant was a dealer in leather, and before the bills accepted by *Battye and Co.* had become due, (in *October*, 1810,) *Battye and Co.* being in want of money, received advances of money from him to the amount of 2500*l.*, on the credit of the hides which were delivered into his hands; the defendant had other goods from *Battye and Co.*, in his hands at the same time, but the advances were made on the credit of the hides. In the course of the former dealings between the plaintiffs and *Battye and Co.*, it had been usual for the plaintiffs to draw bills on the latter on the strength of such consignments. When *Battye and Co.* delivered the hides

A. consigns to B., a broker, a quantity of hides, desiring him to act according to his discretion, and soon afterwards draws upon him for the amount, and B. accepts bills for the amount; B. is not entitled to pledge the goods in order to raise money to meet these bills, although it has been the usual course for A. to draw bills, and for B. to accept them, upon every consignment of goods.

Although notice has been given to the plaintiffs to produce certain letters, the defendant cannot cross examine the plaintiffs' witnesses as to their contents.

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to the defendant the names of the principals were not mentioned. In *November*, 1810, the plaintiffs wrote to the defendant, stating, that they had been informed that *Battye and Co.* had sold the hides in question to them, and requesting that they would retain the proceeds in their hands, otherwise they should claim the amount from the defendant. There was a running account between the plaintiffs and *Battye and Co.*, as also between the latter and the defendant.

The question seemed to be narrowed to the point, whether, under the circumstances, *Battye and Co.* had any right to pledge the goods.

LORD ELLENBOROUGH. — I think the case raises a point fit for consideration. In ordinary cases, a broker has no right to pledge the goods of his principal. The only question here is, whether, under the special circumstances of the case, an authority to pledge the goods may not be implied.

Verdict for the defendant; with leave to the plaintiff to move the point.

The defendant had given notice to the plaintiff to produce certain letters.

Garrow, A. G., for the defendant, in the course of cross-examining the plaintiffs' witnesses, inquired as to the contents of those letters.

Upon

Upon the objection being taken by *Topping* for the plaintiff,—

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LORD ELLENBOROUGH was of opinion, that the evidence in that stage of the cause was inadmissible. It was properly the evidence of the defendant, and therefore ought to be given in its proper turn. That which was the substitute could not be given in evidence at an earlier period than that for producing the original.

Topping and *Parke* for the plaintiffs.

Garrow, A. G., *Adam*, and *Spankie*, for the defendant.

The Court having granted a rule nisi for a new trial, the case was afterwards argued at *Serjeant's Inn*. (a) It was contended (principally) for the defendants, that *Battye and Co.* had a right to dispose of the goods in the way they had done, whether the case were to be considered with or without reference to the state of the accounts between them and the plaintiffs. In *July* the sum of 2250*l.* was advanced by *Battye and Co.* on the credit of the hides. Till those bills had become due, *Battye and Co.* had pledged their credit to that amount, and had acquired a lien on the goods, which could not have been taken out of their hands. In this state of affairs, *Battye and Co.*, acting themselves as principals, drew on the de-

(a) *Sittings* before Hilary Term, 1817.

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defendants and obtained the sum of 2500*l*. In doing this they did not act tortiously ; they had a right to raise money to meet their own acceptances. There was a running account between *Battye and Co.* and the defendant ; and the latter did not take the goods as a pledge, but as an item in the account. But that, at all events, the plaintiffs had enabled *Battye and Co.* to act as principals, and had consequently invested them with the power of pledging the goods. The plaintiffs had been in the habit of consigning goods to *Battye and Co.*, and of drawing upon them for the amount, without inquiring after the names of the purchasers. The goods were considered as funds, on which the plaintiffs were to draw ; and *Battye and Co.* were to be considered as principals, and not as mere brokers. It was not the case of a person employing another to sell *qua factor*, but of one enabling another to deal with the goods as his own ; no account of sales, or of the names of purchasers, having been asked for. The defendant found *Battye and Co.* dealing with the goods as their own ; and the plaintiffs having enabled them so to act, ought to suffer rather than the defendant.

LORD ELLENBOROUGH. — The agents of the plaintiffs in this case were brokers in the city of *London*. It would be very desirable, when persons who sustain the character of brokers assume an ulterior authority, if those with whom they deal would make inquiry whether they were authorised so to deal : it would be the means of avoiding

much deception; and the omitting to take this precaution has occasioned a great proportion of the cases litigated at *Guildhall*. In this case, the largest authority was delegated to *Pilgrim* and *Battye* as factors; they were to deal with the goods according to their discretion: it was the largest authority as to sale, to whom the goods should be sold, the time, the quantum of price; no powers could be more extensive. There was a stipulation that they should be permitted to draw as before; and therefore it would not have lain in their mouths to have objected to a sale as being disadvantageous in its terms. When they came to deal with the defendant as if they had a principal behind, or if there was any reason for the defendant's apprehending that there was a principal behind, and that *Pilgrim* and *Battye* were acting merely as brokers, it was for him to inquire what authority they had to pledge the goods, as has been decided in a multitude of cases. If such application had been made, it would have appeared that the brokers had no authority to pledge the goods. There was no express authority, nor was there (which is the only question which has created any doubt) any implied authority to pledge; but it is the mere case of goods placed in the hands of a broker for the purpose of sale, with a stipulation to make advances to the principal. There should have been an express stipulation for an authority to pledge: such an authority might have been demanded and given; but it was not, and therefore the case falls within the decision in *Paterson v. Tash*, and other cases,

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cases, in which it has been determined that it is not within the scope of the factor's authority to pledge the goods.

BAYLEY, J. — No doubt a factor has no right to pledge the goods of his principal, and a person making advances upon a pledge of goods ought to inquire whether he has an authority which warrants him in pledging the property. A person who buys the goods is safe; but if he takes them upon pledge, he does it at his peril. The case of *Shipley v. Kymer* (a) is on all fours with the present. The mere circumstance of the plaintiffs' drawing against their consignments, or of their drawing from time to time on former consignments, can give no authority to the factor to pledge the goods. If the principal draws bills which the factor accepts, he may, not by pledging, but by sale for ready money if he choose, raise funds to meet those bills; and if he apprehends that he cannot sell for ready money or discountable bills, it is his own fault to accept. In this case, therefore, the factors had no authority to pledge, and the case is not distinguishable from the common cases. It has been said, why did not the plaintiffs sooner cause the defendant to be put upon his guard, as soon as it was suspected that he had taken the property on pledge. The answer is, that it does not appear that the plaintiffs knew how the matter stood, and therefore I do not see any facts which distinguish this from the ordinary case.

(a) 1 M. and S. 484.

ABBOTT,

ABBOTT, J. — It has been decided, and is now the settled law, that a factor cannot pledge the goods of his principal; and it is for the benefit of commerce that this principle should be held sacred and inviolate. The person who entrusts another with the sale of his goods has no other security for the safety of his property except the incapacity of the agent to dispose of it otherwise than by sale. But it is said, that although a factor cannot, according to the general rule, pledge the property of his principal, yet he may under a special authority for that purpose: and beyond all doubt there may be cases in which the principal clothes his agent with a higher authority; and a doubt occurred to his Lordship at the trial of this cause, whether such an authority could be implied from the circumstances of this case. Considering all these circumstances, it appears to me, that the discretion to be exercised must be understood as a discretion to be exercised according to the duty of the parties as factors, and that they were to deal with the property according to such discretion as a factor ought to exercise. It appears that the plaintiffs drew on *Battye* and *Pilgrim*, and had drawn upon them on former occasions upon the consignment of goods to them for sale; but this is the common, if not the universal course: when a manufacturer sends goods into the country for sale, he constantly draws on the strength of his consignments. This is the usual course of dealing: goods are consigned, and bills are drawn: to allow the factor in such a case to pledge the goods, would operate to the

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the destruction of a principle which the law holds sacred.

HOLROYD, J. — I am of the same opinion. The transaction amounts merely to a pledging of the goods by the factor to another, in order to raise money, which by the general law he has no right to do. If from the special terms on which the goods were consigned, an authority to pledge them could have been inferred, the case might have been different; but I think that the discretion vested in the brokers was nothing more than a discretion to be exercised in the sale of the goods. The circumstance of advances having been made does not alter the case. The admission of such a distinction would destroy the principle altogether.

Rule absolute.

See *Shiple v. Kymer*, 1 M. and S. 484.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sitzings after Hilary Term,

57 GEORGE III.

WESTMINSTER.

WILLIS v. BARRETT.

1816.

THIS was an action by the payee of a promissory note.

In the body of the note the amount was made payable to *Elizabeth Willison*, the action was brought by *Elizabeth Willis*.

The plaintiff was allowed to adduce evidence to show that *Willison* was inserted by mistake for *Willis*, and that she was the person really intended.

LORD ELLENBOROUGH left it to the jury to say whether this was not a mistake, and the jury found for the plaintiff.

Espinasse and *Hutchinson* for the plaintiff.

The cause was undefended.

A plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may shew by evidence that he was the person intended.

There

1816.

WILLIS
v.
BARRETT.

There was no variance here between the record and the note, since the declaration alleged a promise to pay *Willis* by the name of *Willison*. — A variance between the record and the bill of exchange or note declared upon is fatal, as where a bill drawn by *Crouch* is declared on as drawn by *Couch*. *Whitwell v. Bennett*, 3 B. and P. 559. and see *Gordon v. Austin*,

4 T. R. 611. *Wilson v. Gilbert*, 2 B. and P. 281. That parol evidence is admissible in general, in order to correct a mistake or remove a latent ambiguity, see *Baker v. Paine*, 1 Ves. 456. *Shelburn v. Inchiquin*, 1 Bro. C. C. 92. 1b. 350. *Jones v. Statbam*, 3 Atk. 388. *Rex v. Scammonden*, 3 T. R. 474. *Irnham v. Child*, Bro. C. C. 92.

ENGLISH v. CHARTERS.

Proof that the defendant, in trover, stated, that he sold the property in question on the plaintiff's account is not *prima facie* evidence of a conversion.

THIS was an action of trover, to recover the value of a chariot and of a tilbury.

The defendant was a coachmaker, and had detained these carriages on account of some claim which he had upon them; but it was contended by the plaintiff, that the defendant had been guilty of a conversion, in selling the chariot without any authority from the plaintiff.

There was no evidence to shew any conversion of the tilbury; but, in order to shew a conversion of the chariot, the plaintiff gave in evidence, a return made by the defendant to the tax-office, in which was contained the following item, "One chariot sold on account of ——— *English* to ——— *Curl*." He also gave in evidence, a receipt by the defendant for the price of a second-hand chariot for ——— *English*.

This, it was contended, amounted to *prima facie* evidence

evidence of a conversion, and it was urged, that it was incumbent on the defendant to shew that he had received authority from the plaintiff to dispose of the chariot.

1816.

ENGLISH

v.

CHARTERS.

LORD ELLENBOROUGH. — The documents state, that the sale was on the account of *English*, and are therefore referable to some supposed authority. There is no evidence of a sale unconnected with the statement, that it was made on the plaintiff's account.

Plaintiff nonsuited.

Marryatt and Curwood for the plaintiff.

Topping and Gurney for the defendant.

REES v. SMITH and Others.

THIS was an action of trespass, for breaking and entering the plaintiff's house, and seizing and converting her household goods. Pleas, the general issue and two other pleas, alleging a fraudulent and clandestine removal to avoid a distress for rent. The replication to the two special pleas took issue upon the fact of fraudulent and clandestine removal.

On the part of the plaintiff, a *primâ facie* case of trespass was proved as alleged, and the defendant then went into evidence, in order to shew, as alleged

In an action of trespass, where the general issue is pleaded, and also special pleas are pleaded, alleging a clandestine removal to avoid a distress, the plaintiff ought to go into the whole of his case in the first instance.

1816.

REES

v.

SMITH
and Others.

leged in the pleas, that the removal was fraudulent and clandestine.

Gurney, on the part of the plaintiff, afterwards proposed to go into general evidence, to shew that the removal was not fraudulent and clandestine : but —

LORD ELLENBOROUGH was of opinion, that it was not competent to him, in that stage of the cause, to enter into such evidence, since all the circumstances were in issue, and the removal might have been proved to have been *bonâ fide* in the first instance. That the general rule was, that when, by pleading or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts ; and therefore, that the plaintiff in this case should at once have proceeded to his evidence to repel the inference of a fraudulent removal, and to shew that it had been in the contemplation of the party to change her residence previously. — His Lordship afterwards added, As a general rule, I beg that it may be understood, that a case is not to be cut into parts, but that when it is known what the question in issue is, it must be met at once. If, indeed, any one fact be adduced by the defendant to which an answer can be given, the plaintiff must have an opportunity given for so doing ; but this must be understood of a specific fact, he cannot go into general evidence in reply to the defendant's case.

There

There is no instance in which the plaintiff is entitled to go into half his case, and reserve the remainder.

The evidence was accordingly excluded.

1817.

REES

v.

SMITH
and Others.

COPELAND v. LEWIS.

Feb. 15.

THIS was an action brought to recover the sum of 5*l.* 0*s.* 8*d.*, the amount of a chest of tea sold by the plaintiff to the defendant.

The cause of action being under 10*l.*, the only question was, whether the cause of action arose within the principality of *Wales* or not, the defendant contending, that it arose within the principality, in order that he might have the benefit of a nonsuit, according to the provisions of the *Welsh* judicature act, 13 G. 3. c. 51. s. 2.

It appeared that the defendant resided at *Aberystwith*, and that he gave an order to the traveller of the plaintiffs (who were dealers in *London*) at *Aberystwith* for the tea in question. Nothing was said as to the place of delivery, but the tea was, in fact, delivered by the plaintiffs to a carrier at the *Castle and Falcon, Aldersgate-Street*, to be conveyed to the defendant.

A vendee at *Aberystwith* gives an order for goods to the traveller of the plaintiff, who is a dealer in *London*; nothing is said about the mode of carriage, it is to be presumed that the goods are to be sent in the most usual and convenient way, and therefore upon the delivery of the goods to a carrier in *London*, a cause of action arises in *London*.

Jervis, for the plaintiff, contended, that the cause of action arose in *London*, where the goods were delivered, and he referred to the case of

1817.

COPELAND

v.

LEWIS.

Harwood v. Lester (a), where goods having been delivered to a carrier in *London*, according to an order of the defendants in *Leicestershire*, it was held, that an action could not be maintained in the county court of *Leicestershire*, and therefore, the Court of Common-Pleas refused to stay the proceedings in an action in that court, although the debt amounted to less than 40s. ; and where *Heath*, J. intimated, that authorities were to be found in the books to shew, that where goods are sent from one county into another, the cause of action is to be considered as arising in the county from which they are sent, and not in that where they are delivered. And he also cited the case of *Dutton v. Solomonson* (b), to shew that a delivery of goods by the vender on behalf of the vendee to a carrier not named by the vendee, is a delivery to the vendee.

Oldknath, for the defendant, attempted to distinguish the present case from that of *Dutton v. Solomonson*, on the ground, that in that case an order had been given to deliver the goods to a carrier, but that in the present, no such direction had been given ; but —

LORD ELLENBOROUGH said, that he acceded to the opinion of Mr. J. *Heath*, and that where nothing was said as to any carrier, according to common sense it is to be understood, that the

(a) 3 Bos. and Pul. 617.

(b) Ibid. 582.

goods are to be delivered in the most usual and convenient way.

Verdict for the plaintiff.

Jervis and Peake, for the plaintiff.

Oldknath for the defendant.

See *Dutton v. Solomonson*, 3 Bos. and Pul. 582. *Gray v. Cook*, 8 East. 336. *Croft v. Pitman*, 1 Marsh, 269. *Spencer v. Holloway*, 15 East. 647. *Jeffries v. Watts*, 1 N. R. 153.

1817,

COPELAND
v.
LEWIS.

HARMER v. WRIGHT.

Same day,

THIS was an action of debt upon a bond. Plea *non est factum*.

The defendant had given notice to the plaintiff that he intended to rely in his defence upon proof, that the consideration of the bond was an illegal agreement to forego prosecutions for several felonies, and it was contended, that it was competent to the defendant to go into his defence under the plea of the general issue, on the ground of a distinction in this respect between specialties avoided by the operation of a statute, and those which were void at common law.

But Lord ELLENBOROUGH said, that he did not admit such a distinction, and the plaintiff had a verdict.

The defendant cannot, under the plea of *non est factum* to a declaration upon a bond, go into evidence, to shew that the consideration was an illegal one at common law. There is no distinction in such case, between a specialty, which is avoided by a statute, and one which is void at common law.

1817.

HARMER

v.

WRIGHT.

*Garrow, A. G. and Moore, for the plaintiff.**Gurney and Peake, for the defendant.*

See *Colton v. Goodridge*, Bl. R. 1108, where it was held, that the defendant upon the plea of *non est factum* could not insist upon any matter which avoided the deed, either at common law or by statute, if it did not impeach the execution of the deed. See also Gil. L. E. 162. ed. 2. 5 Co. 119. *Cole v. Robins*, B. N. P. 172. 2 H. B. 515. 11 Co. 26.

Feb. 17.

INGLEDEW v. DOUGLAS.

An account stated by an infant is not evidence after he attains his age, even to shew that he has been supplied with the necessities mentioned in the account.

THIS was an action of *assumpsit* for cloaths supplied to the defendant, and on an account stated.

The defendant was a minor, and the plaintiff, in his bill of particulars, claimed for several sums due from the defendant, as appeared upon an account stated by him ; and the plaintiff offered in evidence a written statement by the defendant, which contained on the one side an account of cloaths delivered, and on the other, an account of payments made.

Hutchinson, for the defendant, objected to this evidence. It had been held that it could not be replied to an account stated with an infant, that they were for necessities.

Marryatt, for the plaintiff, contended, that although this account was not evidence upon the count

count on an account stated, yet that it was evidence by way of admission on the part of the defendant, to shew that necessaries had been supplied to that amount.

1817.
 INGLEDEW
 v.
 DOUGLAS.

Lord ELLENBOROUGH doubted, at first, whether the statement was not evidence in this point of view; but after consideration, he was of opinion, that the statement of the account by the infant could not be used as evidence against him.

The plaintiff had a verdict for the sum of 6*l.*, to which the objection did not apply.

Marryatt and Storks, for the plaintiff.

Hutchinson for the defendant.

JACKSON v. TOLLETT.

Same day.

THIS was an action against a coach-owner for the negligence of the coachman, in consequence of which the coach had been overturned, and the plaintiff, an outside passenger, had had his leg broken.

As the defendant's coach was proceeding from *Uxbridge* to *London*, in going up *Notting-hill* slowly, it was met by a waggon, which was nearly in the middle of the road. The road at that place was 30 feet wide. The *Worcester* coach at that time was descending the hill at a quick rate, and the coachman of the defendant apprehending that there

If, when danger occurs, the driver of a stage-coach does not take the safest course, the coach owner is responsible for the mischief which ensues.

1817.

JACKSON

v.

TOLLETT.

was danger of the coaches coming in contact, deviated to the left, and the wheel of the coach was drawn upon a hillock of dirt; had this been soft, no accident would have happened, but the hillock being hard and frozen, did not yield to the pressure of the wheel, which was, in consequence, considerably elevated, and the coach was overturned. One of the passengers, apprehending danger from the course which the coachman pursued, called out to him to warn him. There was also on the other side much evidence to shew, that the coachman had, under the circumstances adopted the most prudent course.

Lord ELLENBOROUGH. — Every person who contracts for the conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences. The coach was ascending the hill, and no blame attaches on account of immoderate speed, nor was the coach overburthened with luggage. It is met by a tilted waggon, behind which was the *Worcester* coach, and it is said that the coachman had to choose whether he would risk the sand-bank or would meet the *Worcester* coach; but the question is, whether he might not have adopted a third more safe and innocent course by stopping: — He encounters the hillock, a hard and solid mass, and which he must have known to be such, for this danger had presented itself to a passenger, who called out to warn him of it; he

knew it also or might have known it from the state of the weather, and he therefore ought to have contemplated it as a risk of considerable magnitude. It is true, that he might have incurred some danger in stopping, and the question is, whether he exercised a prudent discretion. If he would have exercised a better discretion in stopping and the accident would have been thereby avoided, he ought to have adopted that course. This is the question for your consideration: in order to subject the master to damages, it must appear that there has been something to blame on the part of his servant, and he is blameable if he has not exercised the best and soundest judgment upon the subject; if he could have exercised a better judgment than he did, the owner is liable.

1817.
JACKSON
v.
TOLLETT.

Verdict for the plaintiff.

Gurney and Comyn, for the plaintiff.

Scarlett and Marryatt, for the defendant.

See *Mayhew v. Boyce*, 1 Starkie, 423. *Jones v. Boyce*, ib. 493.

LYONS and Another v. BARNES.

Same day.

THIS was an action for goods sold and delivered, and for use and occupation.

The plaintiffs were brewers, and the action was brought to recover the amount of beer sold to

A. sells beer to B. in casks, giving him notice that unless he returns the casks in a fortnight

he will be considered as the purchaser: B. does not return them within a fortnight; A. cannot maintain an action for goods sold and delivered, the whole resting in special agreement.

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the

1817.

LYONS
and Another
v.
BARNES.

the defendant, and also of casks delivered to him.

The defendant had paid money into court, and the case rested ultimately on the question, whether the casks could be considered as goods sold and delivered to the defendant.

It appeared that the casks had contained beer sold by the plaintiffs to the defendant; and that the former had given notice to the defendant, that, unless they were returned within a fortnight, the defendant would be considered as the purchaser.

LORD ELLENBOROUGH was clearly of opinion, that an action for goods sold and delivered could not be maintained with respect to these casks. The goods were left in the house upon particular terms: the whole rested in the special agreement between the parties, and that agreement ought to have been specially declared upon.

Plaintiffs nonsuited.

Gurney and Spankie for the plaintiffs.

Garrow, A. G., for the defendant.

FRASER v. MARSH.

1817.

Feb. 19.

THIS was an action by the plaintiff against the defendant, for the negligence of her servant, in driving the defendant's chariot against the plaintiff's phaeton, by means of which it was overturned and broken.

In an action of tort against a minor, for the negligence of his agent, (*semble*) his guardian cannot render the agent competent by releasing him.

The defendant was a minor, and appeared by her guardian; and on her coachman being called as a witness, he was objected to as incompetent without a release.

A release was tendered by the guardian upon the record; but —

Lord ELLENBOROUGH held, that he was not guardian for the purpose of releasing; and the witness was rejected.

Scarlett and *Starkie* for the plaintiff.

Garrow, A. G., and *Spankie*, for the defendant.

The admission of an infant by his guardian, in his answer to a bill in Chancery, is not evidence against the infant on a trial at law.

See Gil. L. Ev. 2 ed. 51. 3 P. W. 237. 2 Vent. 72. but see *James v Hatfield*, Str. 548.

1817.

Feb. 25.

WILLIAMS v. BRIDGES and Another.

In an action against the sheriff for an escape on mesne process, an admission by the defendant in the former action, as to his liability, is evidence against the sheriff.

THIS was an action against the defendants, as sheriff of *Middlesex*, for suffering *George Bayley* to escape after he had been arrested at the suit of the plaintiff, upon a writ of privilege.

The action against *G. Bayley*, was brought on a bill of exchange, drawn by *G. Bayley* upon *William Shaw*, payable to his own order, and indorsed by *G. Bayley* and by *J. Bayley*. In order to prove notice of the dishonour, the plaintiff proved that he had left with *J. Bayley* a letter, containing notice of the dishonour, to be delivered to *G. Bayley*, and that the latter had acknowledged the receipt of the notice.

Garrow, A. G., for the defendants, objected, that the admission of *G. Bayley* was not evidence against the present defendants.

But *ABBOTT*, J. said, that he understood the rule to be, that an admission which would be evidence against the party would also be evidence against the sheriff; and the evidence was accordingly admitted.

The plaintiff afterwards had a verdict, damages one farthing.

See *Kempland v. Macauley*, Peake N. P. C. 65.

 ADJOURNED SITTINGS AT GUILDHALL.

GIBBONS v. WILCOX, OBERRY, and Another.

1817.

Feb. 27.

THIS was an action of assumpsit against *Wilcox*, *Oberry*, and *Gill*, for procuring a charter-party for their ship from *New Orleans* to *Liverpool*.

Assumpsit against several as partners, the question of partnership being doubtful upon the plaintiff's evidence, the defendants go into their case; and in order to render a witness competent produce a release executed by all of them; this instrument is to be considered as in evidence for all purposes.

The defendants resided abroad; and evidence was given of admissions by *Wilcox* of his partnership with *Oberry* and *Gill*, in letters from him in the course of commercial correspondence in the name of himself and his partners; and also that bills drawn upon the firm had been paid. And the plaintiff also tendered in evidence the ship's register, from which it appeared, on the oaths of *Wilcox* and *Oberry*, that they, together with *Gill*, were the owners of the vessel. This, it was contended on the part of the plaintiff, was sufficient evidence of the partnership. It could not be necessary to shew the assent of each member of the firm, especially where the partners resided at a distance, to each individual partnership transaction; in such case, no person could give evidence of a personal intercourse with all: the only kind of evidence that could be given was of a general correspondence with the house in the handwriting of a person

1817.

GIBBONS

v.

WILCOX
and Others.

person employed by the firm; and the case of *Sangster v. Mazarredo* (a) was referred to.

HOLROYD, J.—The register alone is not sufficient; and the case of *Sangster v. Mazarredo* is distinguishable from the present: there the difficulty was overcome by the production of the circular letter, in which the defendant acknowledged himself to be a partner with the rest of the firm. His Lordship added, that he would not nonsuit the plaintiff upon the objection he might afterwards move upon it.

A witness having been afterwards called for the defendants, an objection was made to his competency, on the score of interest. To obviate this, a release was produced, signed by the defendant *Gill* as well as by the other two defendants.

Garrow, A.G., contended, that by this document the question, as to the partnership of *Gill*, was placed beyond doubt.

Scarlett, for the defendants, contended, that a document exhibited on the *voir dire* was not in evidence for any purpose except as to the competency, which was a question purely for the decision of the Court.

HOLROYD, J.—The question of competency is certainly for the Court alone; but if, on shewing

(a) 1 Starkie, 161.

the competency, matter be given in evidence which is essential to the merits of the cause, I think it would be too much to say, that it is not in evidence.

1817.
GIBBONS
v.
WILCOX
and Others.

It appeared, upon the evidence of one of the witnesses, that, by agreement with the plaintiff, he was to have one half of the commission, *viz.* one and a quarter *per cent.*; and it was objected, that he ought to have been made a co-plaintiff: but—

HOLROYD, J. held, that this was a mere sub-contract; and the witness was examined.

Verdict for the plaintiff.

Garrow, A. G., for the plaintiff.

Scarlett for the defendants.

JACOBS v. JOSEPH HART.

Feb. 28.

THIS was an action by the plaintiff, as the indorsee, against the defendant, as the acceptor, of a bill of exchange.

The question was, whether the bill, after its completion, had suffered a material alteration.

Myers, the payee of the bill, had agreed to let a house at *Portsea* to *Michael Hart*, on the 3d of

April, particular place; this alteration will not vitiate the bill.

After a bill of exchange has been accepted, and whilst it remains in the hands of the payee, he alters it by making it payable at a particular place; this alteration will not vitiate the bill.

1817.

JACOBS

v.

HART.

April, 1815; and the bill in question was drawn by *M. Hart*, in consideration of the good-will of the house and fixtures. The bill was in the handwriting of *Myers*, who dated it, as he stated in the course of the evidence, on the 3d of *March* instead of the 3d of *April*, and delivered it to *Michael Hart*, the drawer, who signed his name to it. *Myers* then took it to *J. Hart*, the defendant, who on reading the bill said, you have dated it on the 3d of *March* instead of the 3d of *April*. *Myers* said, he should not have discovered it, if he, *J. Hart*, had not. *Myers* altered the date to the 3d of *April*.—It appeared, also, that whilst the bill was in the hands of *Myers*, (the payee, who retained it for eight months, and till within four months of its becoming due,) a special acceptance, making the bill payable at Mr. *A. Isaacs*, *St. Mary Axe, London*, was inserted, before it was negotiated by the payee.

Topping, for the defendant, contended, that the plaintiff could not recover on this bill, on account of the alteration; for, although the acceptor had noticed the mistake in the date, and *Myers* had accordingly struck out the first date, the bill was complete and perfect as drawn by *Michael Hart*, and had passed into the hands of the payee. He also contended, that the insertion of the special acceptance vitiated the bill.

LORD ELLENBOROUGH.—A bill of exchange is certainly capable of alteration before it has passed
into

into a state of negotiation, particularly if the alteration be made for the correction of a mistake, as it was here, and made with the acquiescence of the party. (*a*) With respect to the alteration made as to the place of payment, the objection rests upon the *vexata quæstio*, whether the place of payment is to be considered as part of the contract, or merely as a direction where payment will be made. (*b*) I am of opinion, that the objections are without foundation.

1817.

JACOBS
v.
HART.

Verdict for the plaintiff.

Garrow, A. G., Gurney, and Pollock, for the plaintiff.

Topping and Comyn for the defendant.

(*a*) See *Kennerly v. Nash*, vol. i. p. 452, and the cases cited in the note.

(*b*) See *Garnett v. Woodcock*, vol. i. p. 475, and the cases there cited.

SMITH v. HARRIS.

Same day.

THIS was an action on the case against the defendant, for a fraudulent representation that one *Hollingwood* was a trust-worthy man, and a man of property, and that his wife had an annuity of 50*l.*; in consequence of which the plaintiff was induced to give *Hollingwood* credit, whereas he was in insolvent circumstances.

In an action by A. against B. for falsely representing C. as trust-worthy, in consequence of which A. gave credit to C. the latter is a competent witness.

Hollingwood

1817.

SMITH

v.

HARRIS.

Hollingwood was called as a witness, and objected to as incompetent; but—

LORD ELLENBOROUGH was of opinion that he was a competent witness, since the proceeding was not for the debt, but was collateral, and was founded on the alleged fraud of the defendant; and *Hollingwood* would be equally responsible whatever were to be the result of that cause.

Hollingwood stated, that the defendant had told the plaintiff, that he might lend him (*Hollingwood*) 20*l.* or 30*l.*, and that he would be perfectly safe; and that he (the defendant) would see the plaintiff paid.

LORD ELLENBOROUGH.—These cases come out almost always according to the truth. A promise having been made to guarantee the plaintiff, which is within the statute, there being no note in writing, he brings an action for the misrepresentation. This is nothing more than a guarantee within the statute of frauds.

Plaintiff nonsuited.

Raine and *Lawes* for the plaintiff.

Scarlett and *Comyn* for the defendant.

SIDEWAYS v. DYSON and Another.

1817.

Same day.

THIS was an action by the payee against the acceptor of a bill of exchange.

On the cross-examination of one of the plaintiff's witnesses, the defendants' counsel required the production of the plaintiff's books, notice having been given for that purpose. The plaintiff refused to produce them in that stage of the business, before the defendant had gone into his case.

The defendants' counsel then proposed to give parol evidence of the entries; but —

LORD ELLENBOROUGH said, that, in strictness, the evidence could not be anticipated, although it was rigorous to insist upon the rule, and a close adherence to it might be productive of inconvenience.

The defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents of written documents, although notice has been given to the plaintiff to produce them, and he refuses to produce them in that stage of the cause.

Verdict for plaintiff.

1817.

BRISTOW and PORTER v. TAYLOR.

Upon the dissolution of partnership between the plaintiffs A. and B. it is agreed that the joint debts shall be received by C., an agent appointed by both, for the discharge of their joint debts. The defendant accedes to this arrangement; but afterwards A. countermands the authority to C. and demands the debt from the defendant, which he pays; A. and B. cannot afterwards maintain an action for the debt.

THIS was action of assumpsit against the defendant; and the question was, whether, under the following circumstances, the defendant had been discharged by payment of the debt.

The debt had been contracted previously to *June*, 1812, when the plaintiffs dissolved their partnership. It was then arranged between them that *J. Bristow*, the brother of one of the plaintiffs, should receive the amount of the partnership debts for the benefit of their joint creditors. Notice of this arrangement was given to the defendant, who acceded to it, and promised to pay his debt to *J. Bristow's* agent: but afterwards the plaintiff *Porter* countermanded the authority which had been given, and required the money to be paid to himself; and in *June*, 1814, the defendant paid the debt to *Porter*, who gave him a receipt in the joint names of himself and *Bristow*, the co-plaintiff. After the commencement of the present action, a letter had been written by *Bristow* to the attorney for the plaintiffs, requesting that the action might be withdrawn, that the funds might not be wasted.

On the part of the defendant it was contended, that the action was not maintainable: if one partner was competent to release the debt, he was competent

competent also to receive the money; and the taking the money and giving a receipt were equivalent to a release.

1817.
 Bristow
 and Porter
 v.
 Taylor.

Garrow, A.G., for the plaintiffs contended, that since the defendant knew that the partnership had been dissolved, and that it had been arranged between the parties that all debts were to be paid to *J. Bristow* the brother, upon whom they had condescended as their joint instrument; and since he had assented to this arrangement, he was not justified in afterwards paying over the money to *Porter*. And the case of *Henderson and Smith v. Wild* (a) was cited, where it was held, that a receipt given collusively, after the dissolution of the partnership, by one partner, after notice in the *Gazette* that the joint debts were to be paid to the other partner, was no bar to the action.

LORD ELLENBOROUGH.—The plaintiffs would have been bound by the payment if it had been made to their joint agent. *Bristow*, the brother, as such agent, had an authority, but not coupled with any interest; that authority was therefore revocable: it was competent to either of the plaintiffs to countermand the authority, and to demand the debt. If *J. Bristow* had, in consequence of the authority given him, done any act, it might not have been revocable; but the authority to him was countermandable, and had in fact been countermanded: each partner had a right to countermand

(a) 2 Camp. 561.

1817.
 BRISTOW
 and PORTER
 v.
 TAYLOR.

before any act intervened which in point of law would preclude a revocation. Notwithstanding the dissolution, as far as regards this joint debt, the partnership still continued. If the money had been actually paid over to the agent there would have been an end of the question; the interests of others would have intervened.

Plaintiffs nonsuited.

Garrow, A. G., and Bolland, for the plaintiffs.

Scarlett and Taddy for the defendant.

See Ridley v. Taylor, 13 East, 175. Alner v. George, 1 Camp. 392.

JONES, Administrator of PRITCHARD, v. WILLIAMS.

One who has been mortgagee of certain premises afterwards takes a conveyance in fee simple, in which the same premises are described as unincumbered, from a vendee of the mortgagor; this, in the absence of fraud, is conclusive evidence to shew that the amount of the first mortgage was paid.

THIS was an action on a covenant in an indenture of mortgage (between the plaintiff's intestate and the defendant) for the payment of 500*l.*, and interest. The defendant had pleaded payment at and after the day.

It appeared that the defendant had, previous to the year 1804, mortgaged certain premises to the intestate, and that, in *March* 1804, the defendant sold these premises to *Jones of Glenark*. *Jones of Glenark* at this time borrowed from the intestate the sum of 1000*l.* upon a mortgage of the same premises. *Jenkins*, the attorney for both parties upon that occasion, was since dead. The defendant relied upon the terms of the latter mortgage for proof that the amount of the first mortgage had been paid. This deed recited, that *Jones* had

had agreed to convey the premises to *Pritchard* the intestate, free from incumbrances; and, by the same deed, *Jones* afterwards conveyed the same to the intestate in fee simple. The second mortgage had since been paid off.

1817.
JONES
v.
WILLIAMS.

LORD ELLENBOROUGH. — If the first mortgage had not been paid, it would have been noticed in the deed: this is so conclusive, that, without the strongest evidence to rebut it, by proving enormous fraud, the inference is unanswerable.

Plaintiff nonsuited.

Garrow, A. G., and Chitty, for the plaintiff.

Jervis for the defendant.

KERR v. WILLAN.

March 3.

THIS was an action of special assumpsit against the defendant, as a carrier, for negligence in losing a truss of goods committed to his care.

It was proved that a truss of goods, weighing 56 pounds, had been delivered at the office of the defendant, who was a carrier, at the *Bull and Mouth Inn*, in *London*, to be carried to the plaintiff, who resided at *Dumfries*.

The defendant had paid 10*l.* into court, and he relied upon a notice put up in his office, intimat-

by a porter, although the porter could read, and had seen the notice, if never read it.

In order to affect one who sends goods by a carrier with notice of the term on which he deals, it is not sufficient to shew that a printed notice was exhibited in the carrier's office, where the goods were delivered in fact he had

1817.

KERR

v.

WILLAN.

ing, that he would not be liable for more than at the rate of 20*l.* *per* hundred weight for any goods whose weight exceeded 28 pounds. In order to affect the plaintiff with knowlege of this notice, it was proved, that such a notice was painted on a board and hung up in the defendant's coach-office; and a witness was called, who stated that he was a porter to the waggon by which the goods had been conveyed to town, and that he had taken them to the defendant's office; that he had frequently been at the office before and had seen the board there, but that he did not *suppose* there was any thing upon it; and although he could read, had never in fact read what was upon it until after the loss of the truss.

LORD ELLENBOROUGH. — You cannot make this notice to this non-supposing person: it is difficult to struggle with the common law; and it is incumbent upon a person who wishes to rid himself of his responsibility at common law, to give effectual notice.

Garrow, A. G., for the defendant, contended, that enough had been done to entitle the defendant to the benefit of his notice, since he had done every thing which lay within his power to communicate the terms on which he intended to deal to the plaintiff. The public had an interest in the decision of this cause in favour of the defendant, for if what had been done was not enough, it would not be possible for any one to carry on the business

business of a carrier with safety to himself, care would always be taken to send the goods to the warehouse by a person who could not read.

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KERR

v.

WILLAN.

On the other side, it was suggested, that all difficulty on the part of the carrier might be avoided, by his delivering a printed receipt to the person who brought the goods, specifying the terms of the contract.

LORD ELLENBOROUGH. — The hardship of the case cannot alter the liability of the party. By the common law, the carrier is responsible for the loss of goods, unless he enter into a special contract by which he limits that responsibility. This he may do, by giving notice in the public papers, or by any other medium by which the party with whom he deals is effectually apprized of the terms upon which he proposes to deal. If the person who carried the goods to the office in this case had read the notice, the plaintiff would have been bound by it; but he did not read it; and, consequently, the plaintiff was not bound by the limitations which it contained.

Verdict for the plaintiff, damages 40*l.* 15*s.* 6*d.*

Topping and Walton, for the plaintiff.

Garrow, A. G., and *Barnewall*, for the defendant.

In the ensuing term, *Garrow A. G.*, moved for a rule to shew cause why there should not be a

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KERR

v.

WILLAN.

new trial, contending, that enough had been done by the carrier for the purpose of communicating notice to the plaintiff; it would be impossible to prove actual knowledge, since the party could not be called as a witness, and that every thing had been done which prudence could dictate.

But the Court refused the rule, observing, that it was by no means impossible to give notice to the party who sent goods of the manner in which the carrier meant to limit his responsibility. If the agent could not read, he might still be able to hear; or, at all events, a hand-bill might be delivered to him to be taken to his principal. No doubt, the necessity of giving effectual notice imposed considerable difficulty upon the carrier, but the difficulty arose from the attempt to depart from the old rule of common law which had prevailed for ages, and which could not be avoided without great exertion. No doubt the rule of law might be superseded in the particular case by a special contract, since *modus et conventio vincunt legem*; but then such special contract must be proved; and whether it exists or not, is always a question for the jury.

Rule refused.

See *Leeson v. Holt*, vol. i. 186.

PRIDEAUX v. COLLIER.

1817.

Same day.

THIS was an action by the plaintiff, as the indorsee of a bill of exchange, dated *March 20th* 1816, drawn by the defendant upon *Wood and Co.*, payable to his own order, and indorsed by him to the plaintiff.

Upon the 22d of *May*, the day before the bill became due, application was made by the plaintiff to *Wood and Co.*, and the answer was, that *Collier* had then no effects in their hands; but the clerk of *Wood and Co.*, remarked, that the bill would not be due until the next day, and that it was probable that *Collier* would be in before that time and provide effects. On the next day, the 23d, when the bill became due, the defendant said to the plaintiff, that he understood that he the plaintiff was the holder of the bill, which he hoped would be paid; that he would see what he could do, and would endeavour to provide effects, and would see him again. The bill was not presented to the drawees on the 23d, but was presented on the 24th, and the witness was about to state what passed between the drawees and himself upon that occasion; but —

The holder of a bill of exchange applies to the drawee on the day before the bill becomes due, who informs him that he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day. On the next day the drawer informs the holder, that he will endeavour to provide effects, and will call upon him again. This does not supersede the necessity of a presentment on that day.

LORD ELLENBOROUGH held, that what passed between the drawee and the holder after the bill had become due was not evidence, since he was no

1817.

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v.

COLLIER.

longer to be considered as the agent of the indorser.

Scarlett contended that, under these circumstances, enough had been proved to entitle the plaintiff to recover; the defendant had said that he would endeavour to find effects, and would call again.

LORD ELLENBOROUGH. — The evidence shews that it was not likely that the drawees would accept the bill, but it was possible that they might change their minds. The drawer is liable upon the default of the drawee, of which he must have notice, that default is a condition precedent; and it does not appear in this case, that there was a default on the part of the drawee.

Plaintiff nonsuited.

Scarlett and *Chitty* for the plaintiff.

Garrow, A. G., and *Williams*, for the defendant.

See *Clegg v. Cotton*, 3 Bos. and Pull. 239, where the drawer had lodged funds in the hands of the indorsee to answer the bill upon the presumption that the drawee

would make default; and it was held that the drawer was discharged for want of notice of the dishonour.

PASMORE v. BIRNIE.

1817.

THIS was an action by the plaintiff against the defendant, the assignee under a commission of bankruptcy, for business done by the former as solicitor to the commission.

The defence attempted to be set up was, that the commission had been prosecuted upon a representation by the plaintiff, that an English commission of bankruptcy extended to the *Isle of Man*: and it was stated, that the bankrupts, *Allen* and *Torrens*, had absconded to the *Isle of Man* with their property, leaving no effects in England; and that the defendant had been deceived by this representation, and the commission had been wholly fruitless.

LORD ELLENBOROUGH.—This does not go to the root of the action. If there has been such a misrepresentation as is complained of, the party may have recourse to a cross action; but the commission cannot be considered as a mere nullity; it operates at all events as a voluntary assignment.

Gurney, for the plaintiff, suggested, that by the laws of the *Isle of Man*, debts contracted beyond the limits of the island might be recovered there; they only protected persons resident there for a certain time: and that, by an act of *Tynewald*,
persons

It is no defence to an action by a solicitor against an assignee under a commission of bankrupt, that the commission was sued out under a misrepresentation by the plaintiff that the commission would be operative in the Isle of Man, and that it has been wholly fruitless; for the commission cannot be treated as a mere nullity.

1817.

PASMORE

v.

BIRNIE.

persons who had committed offences in *England* against the bankrupt laws were subject to proceedings against them.

Verdict for the plaintiff.

Gurney and ——— for the plaintiff.

Garrow, A. G., and *Scarlett*, for the defendant.

See *Dax v. Ward*, vol. i. 409, and the cases there referred to.

SAMUEL v. DARCH and Others.

A declaration, alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery.

A carrier's receipt for goods is evidence of the contract between himself and the owner.

THIS was an action against the defendants, who were carriers, for not having delivered a case of shoes.

The declaration alleged the delivery to the defendants, being carriers, of certain packages containing shoes, to be by them conveyed to *Liverpool*, and there to be safely and securely delivered for the said plaintiff; and that the defendants undertook and promised so to convey and deliver the same within ten or twelve days then next following.

The delivery of the goods to the defendants was proved, and it appeared that the defendants then gave a receipt in the following terms ; —

“ 6 October, 1815. Received a case of shoes,
 “ which we engage to deliver in *Liverpool*, in 10
 “ or 12 days from the date hereof, to the bearer
 “ of this receipt. J. Brown, for *Darch and Co.*”

It

AFTER HILARY TERM, 57 GEORGE III.

It appeared that the goods had been delivered by mistake to a wrong person.

1817.

SAMUEL

v.

DARCH
and Others.

Topping, for the defendant, objected, that this was a special contract to deliver the goods, not, as alleged in the declaration, for the plaintiff, but to deliver them to the bearer of this receipt; and therefore, that it should have been alleged, either that the plaintiff was the bearer of the receipt, or that the defendants refused to deliver the goods to the bearer.

For the plaintiff it was contended, that the undertaking, in substance, was to deliver the goods according to the appointment of the plaintiff, and that the receipt given in evidence was not the contract, but only evidence of it.

LORD ELLENBOROUGH. — It was not a contract to deliver to the plaintiff in an unqualified sense, the defendants had a right to stipulate for the evidence of the receipt. If the declaration had been in trover, the plaintiff would have been entitled to recover, since the delivery of the goods to another amounted to a conversion.

Plaintiff nonsuited.

Scarlett and *Jones* for the plaintiff.

Topping and *Lawes* for the defendants.

1817.

COLMAN v. EYLES.

A landlord having authorised a distress for rent, is liable for the necessary expences, and although the plaintiff was sent by the defendant to take possession of the goods distrained, who promised to pay him, the latter will not be liable without a note in writing.

THIS was an action of assumpsit, for work and labour, and for money paid, &c.

Allen the landlord of certain premises, in respect of which rent was due, gave a warrant to *Gray* to distrain upon the tenant. The defendant was a creditor of *Allen's* and he paid the broker who valued the goods; and it was contended, that he was liable to pay the plaintiff also, having taken him down to the premises to keep possession of the goods, and promised to pay him, and also to repay him for sums to be advanced to *Emmett*, who was also in possession of the goods distrained; but —

LORD ELLENBOROUGH was of opinion, that since in this case there was a principal, namely, the landlord, who was responsible for the necessary expences of the distress; the case was within the statute of frauds, and that the debt was to be considered as the debt of another; and consequently, that the defendant could not be liable without a note in writing.

Plaintiff nonsuited.

Gurney and Long for the plaintiff.

Topping and Barrow for the defendant.

See *Barber v. Fox*, vol. i. 270. *Harris v. Huntbach*, Burr. 373. *Matson v. Wharam*, 2 T. R. 80. *Anderson v. Hayman*, 1 H. B. 120.

DELACROIX v. THEVENOT.

1817.

March 4.

THIS was an action for a libel and slanderous words. The libel was contained in a letter directed to plaintiff.

Action for a libel contained in a letter written by the defendant to the plaintiff; proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, is evidence to go to the jury of the defendant's intention, that the letter should be read by a third person.

A clerk of the plaintiff proved that he had received the letter; that it was in the hand-writing of the defendant; and that, in the absence of the plaintiff, he was in the habit of opening letters directed to him which were not marked "private." He further stated that defendant, who was well acquainted with the plaintiff, was aware of the nature of his (the clerk's) employment, and that he believed defendant knew that witness was in the habit of opening plaintiff's letters.

Lord ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether defendant did not intend the letter to come to the hands of a third person, which would be a publication.

Verdict for plaintiff. — Damages 100*l*.

Garrow, A. G., and *Chitty*, for the plaintiff.

Gurney and ——— for the defendants.

1817.

CAMPBELL v. CHRISTIE.

A policy of insurance from Calmar to Portsmouth is altered with the consent of some of the underwriters, by inserting the words *or Weymouth* after Portsmouth, the plaintiff cannot recover on the altered policy against an underwriter, who was ignorant of the alteration when it was made, even although upon being informed of the alteration, he said that he would not take advantage of it.

ACTION on a policy of insurance from *Calmar* to *Portsmouth* or *Weymouth*. The policy had been originally from *Calmar* to *Portsmouth*, and all the underwriters had signed it before any alteration was made on it. Afterwards the plaintiff in the presence of several of the underwriters, and with their consent, altered the policy by inserting after the word "*Portsmouth*," the words "*or Weymouth*." The defendant was ignorant of the alteration.

Gurney and *Richardson*, for plaintiff contended that the alteration did not vitiate the policy but was within the exception in 35 G. 3. c. 63. s. 13. and cited the case of *Hill v. Patten*. (a)

LORD ELLENBOROUGH. — In that case there was the consent of all the parties. The alteration without the consent of all the parties avoids the policy.

Gurney then proposed to prove that defendant had said subsequently, that he would not take advantage of the alteration.

LORD ELLENBOROUGH held that that would make no difference.

Plaintiff nonsuited.

(a) 3 East. 373.

Gurney

Gurney and Richardson for the plaintiff.*Scarlett and Campbell* for the defendant. (a)

1817.

CAMPBELL

v.

CHRISTIE.

(a) The st. 35 G. 3. c. 63. s. 13. provides, that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for, shall exceed the sum of 10s. *per cent.* on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by reason or means of such alteration. For the decisions under this section, see *Kensington v. Inglis* and another, 8 East. 273. *Hubbard v. Jackson*, 4 Taunt. 169. *Ridsdale v. Sheddin*, 4 Camp. 107. from which it appears that an extension of the time of sailing preceding the risk does not render a new stamp necessary. So a mistake may be

rectified without a fresh stamp. *Robinson v. Touray*, 1 Maule & Selw. 217. *Robinson v. Tobin*, 1 Stark. 336. But if the subject matter of insurance be altered, a new stamp becomes requisite. As where an insurance on *ship and goods* is altered into an insurance on *ship and outfit*. *Hill v. Patten*, 8 East, 173. *French v. Patten*, 9 East, 351. 1 Camp. 72. *Aliter* where the description only is altered the subject matter remaining the same. *Sawtell v. London*, 5 Taunt. 359. 1 Marsh, 99. where the declaration of interest on a policy of insurance was altered by striking out the words *on ship*, and inserting the words *on goods* as interest may appear, and the insured had really no interest in the ship.

Where a policy was executed in the printed form without any specific subject of insurance being inserted in writing, and the subject matter was afterwards added in writing, and was subscribed by some of the underwriters only, it was held that the assured could not recover on the altered contract against those underwriters who had not signed the altered policy. *Langhorn v. Cologan*, 4 Taunt. 330. See *Park on Insurance*, 7th Edit, 46.

I am indebted to a friend for his note of the above case, and also of the three following cases.

1817.

March 7.

EVERTH v. BLACKBURNE.

An action cannot be maintained on a policy of insurance where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade.

THIS was an action of assumpsit on a policy of insurance.

The defence was, that the policy was void, since the plaintiff's interest was founded on a bottomry bond, given jointly to the plaintiff and one *Hilton*, the st. 6 G. 1. c. 18. s. 12. prohibiting the lending money by two jointly upon bottomry as well as joint insurances by two.

The *Attorney General* for the plaintiff, contended that the act was merely meant to prevent insurances by joint stock companies, and could only be applied to persons becoming partners for the mere purpose of insuring, whereas in this case, the plaintiff and *Hilton* were general partners; but —

Lord ELLENBOROUGH held that this made no difference, since they were still partners for that purpose.

Plaintiff nonsuited.

Garrow, A. G., and *Barnewall*, for the plaintiff.
Scarlett and *Gurney* for the defendant.

JELL v. PRATT.

1817.

March 8.

THIS was an action on a policy of insurance from *New Orleans* to *Madeira*. Total loss. Adjustment 100*l. per cent.* The plaintiff paid the insurance brokers their demand for effecting insurance, &c. At the time of the adjustment, the policy was in the hands of the broker. The defendant's initials were struck out of the adjustment to indicate payment to the broker and the defendant's account with the broker was debited to the loss. This was done before a month had elapsed, which is the usual time of calling on the underwriter to pay. The broker had been ordered by the plaintiff to pay over the money to one *Splidt*. Notice had also been given to the defendant before the month elapsed to pay the money to *Splidt*.

After a total loss and adjustment within a month, and whilst the policy remains in the hands of the broker, the initials of the insurer are struck out of the adjustment to indicate payment, and the broker debits the insurer with the loss. The insurer is still liable to the assured.

The *Attorney General* and *Campbell* for defendant, contended that as the state of the account between the underwriter and the broker was such as to induce the broker to settle the adjustment without receiving the money, the principal was bound by the act of the broker.

LORD ELLENBOROUGH said, he had not the least doubt on the question. The principal is never estopped from demanding the money, unless there is actual payment to the broker, or a credit given.

Verdict for plaintiff.

Scarlett and *Chitty* for the plaintiff.

Garrow, A. G., and *Campbell*, for the defendant.

IN THE COMMON PLEAS.

 GUILDHALL.

1817.

ROTHERY v. HOWARD.

In an action against a certificated conveyancer for negligence in managing the purchase of an annuity for the plaintiff; a joint purchaser is a competent witness for the plaintiff.

THIS was an action on the case against the defendant, who was a certificated conveyancer, for negligence and fraud in the conduct of the plaintiff's business, in negotiating an annuity.

The plaintiff and another were the purchasers of an annuity, in the treaty for which the defendant had been employed upon their joint retainer, and towards the expences of which they contributed equal sums. The annuity was granted to the purchasers as tenants in common, and it was contended that the defendant had been guilty of misconduct in transacting this business, the lands being already incumbered and affording a very inadequate security for the payment of the annuity.

The joint purchaser was called as a witness to prove the negligence on the part of the defendant.

An objection having been raised to his competency on the score of interest.

BURROUGH, J., was of opinion that he was a competent witness. The record in the present action

could never be used as evidence for him, and although he was tenant in common of the annuity with the plaintiff, each having advanced a moiety of the consideration money, their interests were essentially distinct.

The plaintiff was afterwards nonsuited upon the merits.

Best, Serjt., and *Denman*, for the plaintiff.

Vaughan, Serjt., for the defendant.

1817.

ROTHBURY

v.

HOWARD.

YORK LENT ASSIZES.

NEWSAM v. CARR.

THIS was an action on the case for maliciously and without probable cause, procuring the plaintiff to be arrested on a warrant upon a charge of felony.

The warrant itself had been lost, and the plaintiff's counsel were about to give parol evidence of it.

Scarlett for the defendant, objected that it was necessary for them previously to prove the information, since that was the best evidence to shew who caused the warrant to be issued.

In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to shew that the plaintiff's character was suspicious, and that his house had been searched on former occasions.

1817.

NEWSAM

v.

CARR.

Hullock, Serjt., contended that it was no more necessary to prove the information in this case, than it would be to prove the judgment where the *fieri facias* had been lost.

WOOD, B., over-ruled the objection ; it did not appear that any information had been taken.

In the course of the trial one of the witnesses was asked, whether he had not searched the plaintiff's house upon a former occasion, and whether he was not a person of suspicious character. Upon objection taken to this question —

Scarlett contended that it was a proper one, the character of the party was in question, and in actions for slander, such questions were usually put, and it was material to put such questions in an action of this nature, since the issue was whether there was not probable cause for the arrest ; but —

WOOD, B., over-ruled the objection ; in actions for slander, such evidence was admissible, for the purpose of mitigating the damages, and not to bar the action, and that in this case such evidence would afford no proof of probable cause to justify the defendant.

Verdict for the plaintiff, damages 20l.

Hullock, Serjt., *Maude*, and *Tindal*, for the plaintiff.

Scarlett and *Wailes* for the defendant.

GARR and Another v. FLETCHER.

1817.

THIS was an action of trespass, for breaking and entering the plaintiff's close, and pulling down a garden wall, &c. Plea the General Issue.

One ground of defence was, that *Mary Pickles* was the owner of the *locus in quo*, and that the defendant entered and pulled down the wall by her authority. — It was admitted that this defence might be entered into, under the plea of the General Issue.

It was proposed to give in evidence the subsequent declarations of *Mary Pickles*, to shew that she had authorized the acts of the defendant, these it was contended were evidence on the principle that *omnis rati habitio retro trahitur et mandato priori æquiparatur*. Her declarations were, it was urged, admissible because she took the trespass upon herself; but —

WOOD, B., was of opinion that her declarations were not admissible. Suppose an action had been commenced immediately, could she by her declaration have defeated that action? she clearly could not. She ought to have been called as a witness.

The plaintiffs afterwards had a verdict.

Scarlett and *Littledale* for the plaintiffs.

Hardy and *Richardson* for the defendant.

In trespass
q. c. f. the de-
fence is, that
M. P. was the
owner of the
locus in quo,
and that the
defendant en-
tered by the
direction of
M. P, a decla-
ration by M. P.
made subse-
quent to the
act complained
of is inadmis-
sible.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings after Easter Term,

57 GEORGE III.

MIDDLESEX.

1817.

May 20.

LAWTON v. NEWLAND.

A. lends money to B. and receives a gun as a security for the repayment, A. may recover the amount without first returning the gun.

THIS was an action of assumpsit for money lent, &c.

The plaintiff relied upon an admission by the defendant, that the sum of 15*l.* had been advanced to him by the plaintiff.

In defence it was contended, that the sum in question had been advanced by the plaintiff, who was a pawnbroker, upon the pledging of a gun, and that the sum which had been charged by way of interest for the loan, and which the plaintiff might legally take as a pawnbroker, exceeded the ordinary rate of interest; and that if the sum in question was to be considered as advanced by the plaintiff

plaintiff in the way of his trade, then it was contended, that he could not recover, because it was contrary to the nature of the contract that a pawnbroker should maintain an action for the money lent on pledge, at least before the time had arrived when the law allowed him to sell the pledge; and that to allow such an action would operate to the deception of the borrower; and that if it were not to be considered as a transaction under the pawnbrokers' act, then the plaintiff could not recover, since the transaction was usurious; and that at all events the plaintiff was not entitled to recover without having first delivered up or offered to deliver up the gun which he held in pledge.

1817.
LAWTON
v.
NEWLAND.

It turned out upon the evidence, that the plaintiff and defendant had been well acquainted with each other, and that the transaction was rather to be considered as a simple loan, the gun having been pledged as a security for the repayment, than as a pawning under the act, and no usury having been proved —

LORD ELLENBOROUGH was of opinion, under these circumstances, that the plaintiff was entitled to recover, although the gun had not been returned or tendered; the defendant might enforce the return by bringing his action of trover.

Verdict for the plaintiff.

Gurney and Comyn for the plaintiff.

Scarlett for the defendant.

1817.

BIRCH and Another v. TEBBUTT.

A. having a legal claim against B. on bills of exchange accepted by B. and having also possession of a deed of mortgage, executed by B. to a third person, of which he might compel an assignment in equity. B. pays money to A. on account, without prejudice to his claim on any securities. The law applies the payment to the bills of exchange.

THIS was an action by the plaintiffs, as the indorsees of five bills of exchange, each of which was drawn by *Brown & Coombe*, upon and accepted by the defendant, payable to the order of *Brown & Coombe*, two months after date, and indorsed by *Brown & Coombe* to the plaintiffs. The first of these bills was dated *December* the 9th 1815, and the last was dated *January* the 17th 1817; the aggregate of the sums for which the bills were drawn was 4500*l*.

The plaintiffs having given the usual proof of handwriting, it appeared on the statement for the defendant, that the plaintiffs were bankers in town, and had been the correspondents of *Brown & Coombe*, who were bankers at *Windsor*. *Tebbutt* the defendant had an account with *Brown & Co.*, and had executed to them a mortgage for securing the sum of 3000*l*. and had also accepted the bills in question as a further security for the same sum, and also as a security for a further sum. The defendant had no account with the plaintiffs.

Brown & Coombe being indebted to the plaintiffs to the amount of 5000*l*., indorsed the bills in question to them, and also delivered to them the mortgage deeds, but no regular assignment of the latter had been executed.

It was stated also, that if it should be deemed necessary, it could be proved that the plaintiffs knew that the bills of exchange covered the 3000*l*. secured by the mortgage. Soon after the date of the

the last bill, *Brown & Coombe* became bankrupts, and the plaintiffs afterwards claimed from the defendant the amount both of the bills and of the mortgage. The defendant offered to pay 3500*l.* on account of the bills alone; and it was afterwards agreed between them, that this sum should be paid without prejudice to any other claim which the plaintiffs had against the defendant, and a receipt was given in the following terms :

“ Received the 27th of *May* 1816, of Mr. *Robert Tebbutt*, the sum of 3800*l.* on account, without prejudice to the claim we have upon Mr. *Tebbutt* upon any securities we hold.

“ *Birch and Chambers.*”

Under these circumstances, it was contended that the 3800*l.* which had been paid, must be applied to the bills, and that the plaintiffs could not in a court of law recover more than the difference.

On the part of the plaintiffs, it was denied that they had any knowledge that the bills covered the sums secured by the mortgage. And it was contended that the payment was a general one, made on account, not merely of the bills of exchange, but also of the mortgage for which they had a claim in equity, from which the defendant could not extricate himself without payment of the money.

LORD ELLENBOROUGH.—They might have a claim if proper means were to be used, by application to a court

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BIRCH
and Another
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TEBBUTT.

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 and Another
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a court of equity; but the payment was on account generally, and was applicable to any existing demand, but no legal demand existed except on the bills. I cannot go beyond the terms of the receipt, *on account* there means an account, on which the defendant was liable to pay; but he was liable on the bills of exchange only, then there is a qualification without prejudice to any claim we have upon any securities, but they were not in a situation to make any claim on any other securities.

Verdict for the plaintiff, damages 790*l*.

Topping and Bolland for the plaintiff.

Marryatt and Lawes for the defendant.

See *Matthews v. Wallwyn*, 4 Vez. 118.

JOSEPHS v. ADKINS.

A complaint having been made to a magistrate by A. the owner, that his horse has been stolen by B.; an officer although armed with a warrant against A. is not justified under the

st. 31 Eliz.

c. 12. s. 4. in taking the horse out of the possession of a *bona fide* purchaser from B.

THIS was an action of trover for a horse. — Upon the part of the plaintiff, it appeared that having been attracted by an advertisement in the *Times* newspaper, of a gelding to be sold for the sum of 28 guineas, and which was recommended for many valuable qualities, applied at the stables to which he was directed by the advertisement, and ultimately purchased the horse from one *Newbank*, who asserted that he had a right to dispose of the horse, for the sum of 18*l*. 4*s*. The sale took place

ON

on the 16th of *April*, and the horse was sent by the purchaser to a farrier's. A few days afterwards, Mrs. *Cutler* laid an information at the *Bow Street* office against *Newbank*, alleging that he had stolen the horse, and she also applied to the magistrate to have the horse returned to her according to the statute. (a) *Newbank* was taken up upon a regular warrant for felony, and *Adkins* the defendant, upon an oral direction by the magistrate, but without any written warrant or authority, went to the farrier's, and upon seeing the horse, said that was the horse he came for, and that he should take it to his stables, and he accordingly took it away.

The magistrate directed that the horse should be returned to *Cutler*, but there was no written order, except one which was entered in the current book in the office at *Bow Street* on the 3d of *June* following. *Newbank* was committed for the felony, but at the ensuing sessions, the grand jury threw out the bill, and he swore (upon the trial) that Mrs. *Cutler* had sold the horse to him for

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(a) 31 Eliz. c. 12. s. 4. by which it is enacted, that "if any horse, &c. shall be stolen, and after shall be sold in open fair or market, and the sale shall be used in all points as aforesaid, yet nevertheless such sale in six months after the felony done, shall not take away the owner's property, so as claim be made in six months, where the horse shall be found, before the mayor if in a town corporate, or else before a justice of the place where found, and so as proof be made before such magis-

trate in 40 days next ensuing by two witnesses, that the property in such horse was in the party claiming, and was stolen from him within six months next before such claim, but the party from whom the same was stolen may, at all times after, notwithstanding such sale, take again the said horse on payment, or readiness to offer to the party who hath possession, so much as he shall swear before such magistrate, he hath paid for the same."

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ADKINS.

18l., and that she was to be repaid when he received the money from a purchaser on the re-sale, and that he had received from *Josephs* the plaintiff, the sum of 5l. 12s. and three watches which were estimated at 12 guineas, but that he had paid nothing to Mrs. *Cutler*.

Scarlett for the defendant, said that he was ready to go into proof, to shew that the horse had been stolen from Mrs. *Cutler*, by *Newbank* and that since the property by the operation of the statute was not altered by any sale, even in market overt, within six months next after the felony, no property having vested in the plaintiff by virtue of the contract with *Newbank*, he of course could not recover in the present action. But he also contended, that even if he should fail in proving that the horse had been stolen, the defendant would be entitled to the verdict; for the defendant was an officer acting under the authority of the magistrate, in whom jurisdiction was vested by the statute. The magistrate had power under the act to examine into the matter, and to restore the property to the owner, in case it should appear to him to have been stolen. But that it was incidental to the exercise of this authority, that the subject matter should be brought before him, and the defendant had done nothing more than act in obedience to the direction of the magistrate. To hold him civilly responsible for so doing, would be a great hardship, since he would have been liable to an indictment in case he had disobeyed the order.

order. He also contended, that at all events the defendant had not been guilty of a conversion of the property in acting under the magistrate's direction, no subsequent demand and refusal having been proved.

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v.
ADKINS.

LORD ELLENBOROUGH.—The words of the statute are, *if any horse shall be stolen*; and again, if proof shall be made before such magistrate in 40 days next ensuing by two witnesses, that the property in such horse was in the party claiming, and was *stolen* from him within six months, you must therefore lay a ground for the jurisdiction of the magistrate in an actual felony. The magistrate has authority if a horse be stolen, and he cannot have full jurisdiction upon the mere making of the complaint, but it rests upon the supposition of a previous felony committed. The construction of the statute which has been contended for, would give a magistrate an unlimited dominion over this species of property. The order which was subsequently made in the current book, could not operate as a warrant to the defendant. If he had been armed with a written authority or warrant to take the property as well as to apprehend the party charged with felony, he would have been justified; but he had a warrant against the man only, and this did not justify him in seizing the horse. He acted indiscreetly; he went to the stable where the horse was, and said, that is the horse I am looking for, and claimed a right of taking it away to his own stable. He had no authority

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authority as a police officer to do this, and he did not invest himself with a right to go into a person's stables to take a horse.

Scarlett then went into evidence, to shew that the horse had been stolen from Mrs. *Cutler*, whom he called as a witness.

It was objected that she was incompetent, being interested in proving that the property in the horse had not been altered ; but —

LORD ELLENBOROUGH held that this case fell within the principle established in *Bent v. Baker(a)*, since the verdict in this case could not be made use of in any subsequent proceeding for or against her.

Mrs. *Cutler* stated that she had given no authority to *Newbank* to take the horse away, and after other evidence on the part of the defendant,

LORD ELLENBOROUGH left it to the jury to say, whether *Newbank* had been authorised by Mrs. *Cutler* to take the horse, and whether he had by a *bonâ fide* sale transferred the property to the plaintiff.

The jury found for the plaintiff.

Gurney and *Comyn* for the plaintiff.

Scarlett and *Chitty* for the defendant.

(a) 3 T. R.

ONSLOW v. EAMES.

1817.

May 23.

THIS was an action on the case by the Honourable Mr. *Onslow*, on the warranty of a horse.

Roaring constitutes unsoundness in a horse.

The defendant who was a dealer in horses, had sold to the plaintiff two horses for the sum of 150 guineas, which he had warranted sound in every respect. Soon after the sale it turned out that one of them was what is technically called a *roarer*. Mr. *Field*, a veterinary surgeon of experience, stated that roaring is occasioned by the circumstance of the neck of the windpipe being too narrow for accelerated respiration, and that the disorder is frequently produced by sore throat or other topical inflammation, and that the disorder was of such a nature as to incommode a horse very much when pressed to his speed.

Marryatt suggested that it had been held by one of very great authority, that roaring did not constitute an unsoundness.

LORD ELLENBOROUGH. — If a horse be affected by any malady which renders him less serviceable for a permanency, I have no doubt that it is an unsoundness; I do not go by the noise, but by the disorder.

Marryatt then contended that the horse was sound at the time of sale, but it appeared that after

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EAMES.

the plaintiff had discovered the defect, he had applied to the defendant to take him back, and that the defendant said that he was sorry for it, but that he would give him another, and take back the horse complained of.

Lord ELLENBOROUGH thought that this concluded the defendant.

Verdict for the plaintiff, damages 68*l*.

Scarlett and Gilby for the plaintiff.

Marryatt and Taddy for the defendant.

WILLIAMS v. CRANSTON.

A parcel delivered to the driver of a stage coach, to be carried is lost, the master and not the servant is responsible.

THIS was an action on the case. The declaration contained counts against the defendant as a carrier, charging him with negligence in the carriage of a watch delivered to him, to be carried from *London* to *Weybridge*, in consequence of which the watch was lost. It also contained a count in trover.

It appeared that the defendant was the driver of a coach from *London* to *Chertsey*, which set out from the *Bolt-in-Tun*, *Holborn*. The plaintiff had sent the watch in question to be repaired in *London*, and it was delivered in a parcel to the defendant by the direction of the owner, at the *White Horse Cellar*, *Piccadilly*, with directions to deliver it

it to the plaintiff. The defendant was at the same time informed what the contents of the parcel were. The watch had not been received by the plaintiff. Upon application to the defendant he said, that he had always delivered such parcels as had been confided to him. It appeared also that he had conveyed other parcels for the plaintiff, and there was some evidence to shew that he was the driver only, and not the proprietor of the coach. — It did not appear that upon the delivery of this or of any former parcel, any contract or stipulation had been made for any reward to be paid for the conveyance.

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 WILLIAMS
 v.
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Lord ELLENBOROUGH having intimated his opinion that the plaintiff must elect on which count he would proceed; and the plaintiff having elected to proceed against the defendant for the negligent carriage of the watch.

Marryatt, for the defendant contended that he was not responsible, for if the watch had been lost through negligence, the master was answerable for it, and not the servant.

Topping for the plaintiff contended, that in this case no action would lie against the master, the reward for carriage was to be considered as the perquisite of the servant, and he cited the case of *Middleton v. Fowler*(a), where it was held that the master of a stage coach was not liable to answer

(a) 1 Salk. 282.

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WILLIAMS

v.

CRANSTON.

for the loss of a trunk delivered to the driver. If the watch had been delivered on the account of the master, it would have been delivered at the place whence the coach set out, and not to the driver at a different place; or would have been entered in the way-bill.

That it was to be presumed that the defendant was to be paid and not the master, since the former was in the habit of taking parcels; it was an inference of law, that he was to be paid, and he would be entitled to maintain an action for the carriage.

LORD ELLENBOROUGH. — I am of opinion that the defendant was not liable in the capacity of a carrier, and no conversion has been proved to make him liable. I accede to the proposition, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shewn that he had been in the habit of conveying parcels, for hire, the case would certainly be altered; but being the mere servant, it cannot be inferred that he took the parcel to be carried for hire and reward without further proof. The only fact is, that he was the driver of the coach; no contract has been proved, there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant. I should have been glad if the case could have been carried further. At present the

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loss

loss appears to have resulted from the negligence of the master through the medium of his servant.

Plaintiff nonsuited.

1817.
WILLIAMS
v.
CRANSTON.

Topping and Spankie, for the plaintiff.

Marryatt for the defendant.

GOWER v. POPKIN.

THIS was an action of assumpsit for money had and received to the plaintiff's use.

The defendant, an attorney, had commenced proceedings against the plaintiff, upon a demand for business done by the former for the latter as an attorney. The plaintiff demanded the bill, which amounted to the sum of 7*l.* 18*s.* 0*d.* which the plaintiff paid, but he afterwards had the bill taxed, and upon taxation the sum of 3*l.* 7*s.* 0*d.* was deducted from it, which the plaintiff now sought to recover.

The plaintiff having paid to an attorney the amount of his bill, cannot after a reduction of the bill by taxation, recover the difference.

LORD ELLENBOROUGH. — If you once pay money to a party, it is your own voluntary act, and it cannot afterwards be recovered back again. If an application had been made to the court, the case might perhaps have been dealt with differently, but this money certainly cannot be recovered by an action. A very hard case of this kind occurred before Lord *Kenyon*, where a receipt had been lost, and the money had been paid a second time,

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and it was held that the plaintiff was not entitled to recover. (a)

Plaintiff nonsuited.

Platt and Gurney for the plaintiff.

Scarlett for the defendant.

(a) *Marriott v. Hampton*, 7. debtor from afterwards disputing
T.R. 269. See *Brown v. McKinnally*, 1 Esp. 279. The giving a bill of exchange or promissory note in payment of a debt, precludes the
the amount. See *Nash v. Turner*, 1 Esp. Rep. 217. *Solomon v. Turner*, 1 Stark. 51. *Bilbie v. Lumley*, 2 East. 469.

LIDDLOW v. WILMOT.

In an action against the husband for lodging and necessities supplied to his wife, who lives separately from him without any fault of her own, and who is possessed of funds of her own, the question is, whether she has such means as are adequate to her support, according to her husband's situation in life.

THIS was an action against the defendant for lodging and for necessities supplied to his late wife.

It appeared that the defendant and his wife had separated thirty years before the time of bringing the action; that she had separate funds of her own, of which she had all along been in the receipt, amounting after all deductions, to about 110*l. per annum*. The defendant had been for eleven years a prisoner in *France*, and was afterwards a captain on half pay. At the time the lodgings were occupied by his wife, he lived in lodgings with another woman, with whom he had long co-habited, and by whom he had a daughter who was then of the age of twenty-five; who lived with him, and he paid 20*l. per annum* for his lodgings, and had been heard to say that he had an estate in *Worcestershire*.

shire. It appeared that his wife at her death was in possession of two boxes of plate, which she desired might upon her death be delivered to a gentleman whom she had appointed to be her executor. These boxes had been so delivered, but upon a demand made by the husband, they had been delivered up to him. The question was, whether under these circumstances the defendant was liable.

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v.

WILMOT.

LORD ELLENBOROUGH in summing up to the jury observed : This case presents circumstances of an unusual nature. A separation between the defendant and his wife had taken place thirty years before. It does not appear what the original cause of separation was, but a reason for the continuance of the separation does appear, since the defendant formed another connection, and had a daughter who was living with him of the age of twenty-five. During the whole period of separation, it does not appear that any application was made to him for any funds subsidiary to the support of his wife ; she had all along resources of her own, which the plaintiff was acquainted with, and no resort was had to the husband. The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation, but if either from her husband, or from other sources, she was possessed of such means, the law gives no remedy

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against the husband. He is liable only in case of the insufficiency of her funds. The evidence as to his situation is left somewhat obscure, he was for eleven years a prisoner of war, and is now a captain in an invalid regiment on half pay, something has been said of an estate which he possesses in *Worcestershire*, but the amount of it does not appear. He lives with his family in a lodging, for which he gives 20*l.* a year only, and therefore in point of lodgings, she seems to have been better provided than he was, and her style and mode of living appear to have been as competent to her situation in life as those of her husband. The only question is, therefore, whether she has been provided with resources adequate to her situation, if so, and particularly if she has derived that provision from him, the action cannot be maintained. There has been no communication with the husband; on the contrary, he has been refused admittance, particularly at the time when he might be supposed to have the greatest interest in seeing her. The only credit given to the husband, is an implied one, which arises from his situation, and the inadequacy of the funds of the wife. The husband had never been applied to before. It appears that she was possessed of boxes of plate, she might have sold part of them if she had wanted them for her support. Was she then adequately provided for? if so, the circumstance repels all idea of implied credit. When the wife lives separately from her husband without any fault of her own, the law provides that her husband shall be liable for her adequate

adequate maintenance ; but if she is supplied with an adequate proportion of the family means, he is no longer responsible.

Verdict for the defendant.

Marryatt and Lawes for the plaintiff.

See *Hodges v. Hodges*, 1 Esp. 247. *Aldis v. Chapman, ib. Waitb-*
 441. *Rawlins v. Vandyke*, 3 Esp. *man v Wakefield*, 1 Camp. 120.
 250. *Harris v. Morris*, 4 Esp. 41. *Bentley v. Griffin*, 5 Taunt. 356.
Morton v. Withers, Skinn. 348. *Horwood v. Heffer*, 3 Taunt. 421.
Ozard v. Durnford, Selw. N. P.

1817.
 LIDDLOW
 v.
 WILMOT.

WOODS v. DENNETT.

THIS was an action to recover the penalty of a bond entered into by the defendant, under a condition not to carry on the trade of a cheesemonger within the distance of one mile from the plaintiff's shop in *Broad Street*.

The defendant had formerly carried on the business of a cheesemonger in the shop occupied by the plaintiff, and for the sum of 400*l.*, had assigned his share of the premises to the plaintiff, executing a bond with a condition to the effect above stated. Soon afterwards, however, the defendant began to exercise his old calling in *High Street, Mary-le-bone*, and the question was, whether this was a violation of his engagement.

Witnesses were called on both sides, those for the plaintiff stating that the distance between the two

A. in London engages not to open a shop for business within one mile of B's shop, he estimating the distance ; the shortest way of access by the foot-path is to be taken.

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two shops was less than one mile, whilst those called for the defendant, said that the distance exceeded a mile; it appeared, however, that they had adopted different modes of admeasurement, some having taken the nearest line by which a foot passenger could go from one shop to the other, and others having proceeded along the middle of the highway.

The cause was ultimately referred, in order to give an opportunity for more certain admeasurement; but —

Lord ELLENBOROUGH laid down as the principle for estimating the distance, that the shortest way of access by the foot-path, was the proper line for admeasurement.

Gurney and Espinasse for the plaintiff.

Scarlett and Clarke for the defendant.

DUHAMMEL, Administrator of LA TAILLEUR,
 v. PICKERING.

Although a bill drawn by a prisoner of war in France in 1795, upon a person resident in England, in favour of an alien enemy could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace, to pay principal and interest.

THIS was an action by the plaintiff, as the administrator of *La Tailleur*, on four bills of exchange, drawn by the defendant on *Wishaw*, in favour of *La Tailleur*.

It appeared that the bills in question had been drawn by the defendant in the year 1795, when

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he was a prisoner of war in *France*. The bills on being sent to *England* and presented, were refused acceptance, the drawee having no effects of the defendant's in his hands.

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 —————
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 v.
 PICKERING.

In 1802, during the interval of peace, the defendant being in *England*, wrote a letter to the agent of the intestate, in which he engaged to pay the principal and interest due on the bills.

Marryatt, for the defendant, admitted that the letter would have been binding on the defendant, if there had been no illegality in the original consideration, but he contended that the original consideration was wholly illegal and void, and that no subsequent promise could make it good. The stat. 34 G. 3. c. 9. s. 2., enacting that “ If any
 “ person residing or being in *Great Britain*, shall,
 “ after the 1st day of *March* 1794, knowingly and
 “ wilfully in any manner, pay or satisfy any bill of
 “ exchange, note, draught, obligation, or order for
 “ money in part or in the whole, which since the
 “ 1st of *January* 1794, has been, or at any time
 “ during the said war, shall be drawn or accepted,
 “ or indorsed, or in any manner negotiated in, or
 “ in any manner sent from any part of the domi-
 “ nions of *France*, &c.; every person so offending
 “ shall forfeit double the value, and the payment
 “ shall not be effectual against any person who
 “ might otherwise have demanded the same. But
 “ that the demands of all persons shall remain
 “ notwithstanding such payment, and notwith-
 “ standing such bill shall have been delivered up.”

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These were bills within the operation of this statute, the effect of which was to prevent the payment of any such bills, and to place the parties in the same situation as if they had not been paid. This was the only mode of punishing those, who contrary to the enactment of the legislature, gave effect to such transactions. — That the same act provided the means of making remittances to *France*, under the sanction of a licence, without subjecting the parties to repayment, and that the statute having prohibited such contracts in the time of war, they could not be carried into effect in the time of peace. And he contended that this case was very distinguishable from that of *Antoine v. Mostyn*.^(a) There the Court held that if an alien took a bill of exchange, drawn by one detenu upon another, it might be enforced here upon the return of peace. But in that case the bill in question had been drawn after the act had ceased to operate, that act being in force during the war only. And he referred to the words of *Gibbs*, C. J., in that case.

LORD ELLENBOROUGH. — No doubt the bills in their original concoction were void as contracts to be enforced in this country, but they are not so far void that they may not constitute the basis of a promise by which the party may bind himself upon the return of peace. There are moral considerations for such a promise, independently even of the bills themselves, as for instance, the costs of

(a) 6 TAUNT. 237.

the returned bills. It is true that these cannot be recognized as bills of exchange by the law of *England*, but all doubt on the subject is removed by the defendant's express promise to pay the bills with interest upon the return of peace.

Verdict for the plaintiff, damages 840*l.*, being the amount of principal and interest on the former bills.

Scarlett and Denman for the plaintiff.

Marryatt for the defendant.

1817.
DUHAMMEL
v.
PICKERING.

STUART v. LOVELL.

May 30.

THIS was an action brought by the plaintiff, one of the proprietors of the *Courier* newspaper, against the defendant, who was the sole proprietor of the *Statesman* newspaper, for libels contained in the latter paper.

Two passages were principally insisted on by the plaintiff as libellous. — In the first the plaintiff was described as the prostituted *Courier*, the venerable apostate of tyranny and oppression, whose full-blown baseness, and infamy held him fast to his present connections, and prevented him from forming new ones.

The second passage was as follows : —

“ The *Courier* lifts his hand against every man,
“ and except the caterpillars of the state, every
of one public newspaper is not justified in attacks upon the private character of the writer
of another public newspaper.

Under the plea of not guilty to a declaration for a libel, the plaintiff cannot go into evidence to shew that the allegations in the libel are false.

Neither can he give in evidence subsequent declarations by the defendant, where the intention of the publication is not equivocal.

The editor

“ man's

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“ man’s hand is lifted against him. Among his
 “ other freaks, he has lately taken it into his head
 “ to catechise the *Lord Mayor* respecting his
 “ lordship’s conduct to *Spencer* and *Hooper*, the
 “ former secretary, and the latter treasurer to the
 “ *Spencean* society. Now we recollect that the
 “ *Courier* himself filled both these offices to the
 “ society called *The Friends of the People*, in 1793,
 “ and if our memory fails not, we rather think he
 “ had the good fortune to pocket six or seven
 “ hundred pounds of money belonging to the
 “ fund of that society. This to be sure hap-
 “ pened before he betrayed his friends, and per-
 “ haps before even his treachery was suspected.
 “ Either of the Lords *E—*, or *G—*, could throw
 “ much light on this subject, and it was certainly
 “ rumoured at the time, that some steps of a legal
 “ kind were in agitation to compel the *Courier* to
 “ disgorge the money ; now, whatever may be the
 “ other sins of *Spencer* and *Hooper*, we have not
 “ heard that they can be charged with betraying
 “ their employers and seizing the common fund.”

In the progress of the cause, Mr. *Tierney* was called as a witness, and the counsel for the plaintiff were proceeding to examine him for the purpose of falsifying the assertions in the alleged libel.

LORD ELLENBOROUGH. — I cannot allow him to be called for the purpose of falsifying the assertions complained of. There is no plea of justification on the record, and therefore I can no
 more

more hear a falsification on the one side, than a justification on the other.

1817.

STUART,

LOVELL.

Marryatt for the plaintiff, afterwards tendered in evidence subsequent publications by the defendant in the *Statesman* newspaper; these he contended were admissible, to shew, *quo animo*, the defendant published the paragraphs in question; they would have been admissible in that point of view, in case of an indictment, and were equally so (he contended) in the case of an action; they were not he said in themselves substantively actionable.

LORD ELLENBOROUGH. — No doubt they would be admissible in the case of an indictment, and so they would here shew the intention of the party if it were at all equivocal, but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing the damages.

The evidence was accordingly rejected.

Scarlett for the defendant, in the course of his address to the jury, referred to the case of *Heriott v. Stuart (a)*, where it had been held that an action is not maintainable by one editor of a newspaper against another for mere vulgar abuse, unless it operated so as to affect the sale of the paper; and he contended that the present publication was not libellous, since great part of it related merely to a

(a) 1 Esp. 437.

supposed

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supposed change of opinions on the part of the plaintiff, and it ought not be imputed to any man as a crime, that he had changed his opinions. The editor of a newspaper might at one period of his life be of opinion that one political line was right, and afterwards change that opinion.

With respect to the latter part of the publication, he contended that the writer merely contemplated such conduct on the part of the plaintiff as might subject him to a civil action, and to say that a man had withheld money until it became necessary to commence an action in order to recover it, was very different from saying that he had embezzled it.

Lord ELLENBOROUGH informed the jury that the publication contained two passages which were particularly the subjects of complaint. In the first, the plaintiff was described as the prostituted *Courier*, and his full-blown baseness and infamy were represented as holding him fast to his present connections, and preventing him from forming new ones. It was certainly competent to one public writer to criticise another, exerting his talents in all the latitude of free communication belonging to a public writer and so it appeared to Lord *Kenyon* in the case of *Herriot v. Stuart*. That the opinions and principles of a controversial writer were open to criticism and ridicule in the same way as those of any other author; but that the privilege did not extend to calumnious remarks on the private character of the individual. In
that

that respect the editor of a newspaper enjoyed the rights of protection in common with every other subject.

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v.
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Since then the defendant in this case had stigmatized the plaintiff as the venerable apostle of tyranny and oppression, and as a man whose full-blown baseness and infamy held him fast to his present connections, because they left him without the power of forming new ones; in all this, he undoubtedly had overstepped the limits which had been drawn, and by which his conduct ought to have been regulated.

But there was another part of the publication relied on, in which the alleged libel charged the plaintiff with misconduct in respect of a pecuniary trust, when he was acting in the capacity of secretary.

His Lordship afterwards intimated his opinion, that this charge against the plaintiff did not merely mean that he had received so much money, on account of which he was liable to an action, but was rather to be understood as a charge of embezzlement; for it was stated, that it was certainly rumoured at the time, that some steps of a legal kind were in agitation to compel the man of the *Courier* to disgorge the money. The term *disgorge* was certainly an offensive one, and if the jury were of opinion that fraud was meant to be imputed to the plaintiff in the latter passage, on that ground also they ought to find for the plaintiff.

Verdict for the plaintiff, damages 100/.

Marryatt, Gurney, Curwood, and Chitty for the plaintiff.

Scarlett for the defendant.

1817.

May 31.

A promise by a defendant to pay a debt by instalments, when he is able is sufficient to take a case out of the statute of limitations, without proof of time being given, or of the ability of the party.

THOMPSON v. OSBORNE.

THIS was an action of assumpsit by a seaman to recover wages, in respect of a voyage to *Russia* and back again, in the year 1800; the plaintiff and the rest of the crew having been arrested during their stay in *Russia*, and sent by the Emperor *Paul* into the interior of the country. (a)

The declaration contained several special counts stating the circumstances, and also counts in indebitatus assumpsit for work and labour. Pleas the general issue and the statute of limitations.

The plaintiff relied in the first instance on a letter written by the defendant, dated *March 22d*, 1804, in which he stated that the question concerning the right to wages under the circumstances of the case, was then pending in the House of Lords (*Beale v. Thompson*) and that if that case should be decided against the defendant, all the wages due would be paid. A copy of the judgment for the plaintiff in the case before the House of Lords was produced.

Marryatt for the defendant, objected that the special counts alleged an absolute contract, and not a conditional one, such as was proved in evidence.

Gurney for the plaintiff, contended that he was

(a) See *Beale v. Thompson*, 3 Bos. & Pull. 405. 4 East, 546.

entitled to recover on the common counts for work and labour, as in *Delamainer v. Winteringham*, (a) and to take the case out of the statute of limitations, it was proved that in the preceding *April*, an application had been made to the defendant for payment, and that the defendant had there stated, that he was in embarrassed circumstances, but that if time were given, he would pay the debt by instalments.

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OSBORNE.

Marryatt objected that the promise was merely a conditional one, to pay by instalments if time should be given, but —

LORD ELLENBOROUGH was of opinion, that a promise to pay the debt by instalments was sufficient to take the case out of the statute.

Verdict for the plaintiff.

Gurney and Chitty for the plaintiff.

Marryatt for the defendant.

(a) 4 Campb. 186.

In *Davis v. Smith*, 4 Esp. 36. Lord Kenyon held, that a conditional promise by a party to pay the debt when he should be able, did not take the case out of the Statute of Limitations, and that in such case, the plaintiff could not recover until the defendant was of sufficient ability; but it seems now to

be held, that the effect of the statute is to raise a presumption from lapse of time, that the debt has been satisfied, and consequently, its operation may be defeated by any declaration or acknowledgement, that the debt has not been satisfied, which is sufficient to rebut that presumption.

1817.

HANCOCK v. CLAY.

A. engages to indemnify B. against a debt due from A. and B. to C. of 50*l.*; A. and B., in fact, owe C. 74*l.* and C. refuses to accept 50*l.* from A. without payment of the remainder of his debt; and C. arrests B. for the whole debt. A. is liable to B. on his engagement to indemnify him.

THIS was an action on a bond by the defendant, to indemnify the plaintiff against certain claims upon which the plaintiff was liable, jointly with one *Knowles*.

The plaintiff and *Knowles*, being partners, agreed to determine their copartnership, and it was (*inter alia*) stipulated between them, that *Knowles* should pay all the debts due from the firm, and the defendant and *Knowles* entered into a bond, conditioned for the payment of such debts as were mentioned in a schedule annexed to the deed, and to indemnify the plaintiff against them. The cause of complaint in the present action was, that *Knowles* and the defendant had not indemnified the plaintiff against certain debts specified in the schedule, as due to *Parke*s and to *Humphries* respectively.

Marryatt for the defendant contended, that with respect to the proceedings at the suit of *Parke*s, the plaintiff was not entitled to recover, because the arrest of the plaintiff by *Parke*s was attributable to his own conduct alone. He stated, that the debt specified in the schedule as due to *Parke*s, amounted to 50*l.* only, but that, in fact, the sum of 74*l.* was due to *Parke*s from the firm; and that the defendant had offered to pay the 50*l.* provided the plaintiff would pay the remaining 24*l.*; but that *Parke*s had refused to take the 50*l.* and the plaintiff,

plaintiff, preferring to be arrested, in order that he might have a cause of action against the defendant, had refused to pay the 24l.

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v.
CLAY.

LORD ELLENBOROUGH. — The obligation is to discharge all debts due and owing, the particulars of which are set forth in the schedule, the debts are erroneously stated there, and the 50l. specified there cannot be separated from the remainder, and as long as it subsisted as a ground for arresting the plaintiff, he was entitled to insist on the indemnity. If the plaintiff wantonly incurred the arrest by his own misconduct, it should have been pleaded that he was not damnified, except through his own default.

Verdict for the plaintiff.

Scarlett and Jones, for the plaintiff.

Marryatt and Puller, for the defendants.

MARRYATTS v. WHITE.

June 3.

THIS was action upon a promissory note given by the defendant, as the surety for flour to be delivered to one *Moulds*, his son-in-law, by the plaintiff, who was a dealer in flour.

Security having been given by a surety for goods to be supplied to his principal, and not in respect

of a previously existing debt, goods are subsequently supplied, and payments are from time to time made by the principal, in respect of some of which discount is allowed for prompt payment, it is to be inferred in favour of the surety, that all these payments were intended in liquidation of the latter account.

H 3

At

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v.

WHITE.

At the time the note was given, it was stipulated, that it should operate as a security for such goods as should afterwards be delivered, and not for a debt which then existed. Flour had been subsequently delivered to the amount of 239*l.* 16*s.* 2*d.* and the sum of 209*l.* 18*s.* had been paid by *Moulds*, and the only question was, whether the sums which had been paid were to be considered as paid in liquidation of the old or new account.

On the part of the plaintiff it was contended, that since no application had been made by *Moulds* himself, the plaintiff was at liberty to apply the payments to the old account.

On the other hand it was proved, that the usual term of credit upon sales of flour was three months, and that discount was allowed for earlier payments; and that in some instances, *Moulds* had, in fact, made payments before the time of credit had expired, and discount had been accordingly allowed.

LORD ELLENBOROUGH. — I think that in favour of a surety, such payments are to be considered as paid on the latter account. In some instances the payments were immediate, and in others before the time had expired, within which a discount was allowed, *ex plurimis disce omnes*. Where there is nothing to shew the *animus solventis* the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods

goods previously supplied is irrefragable evidence to shew that the sum was intended in payment of those goods, and the payment of sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it was made in relief of the surety.

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Verdict accordingly.

Scarlett and Stephen, for the plaintiff.

Marryatt for the defendant.

See vol. i. 153. *Plomer v. Long*, and the cases there cited.

LEGGETT v. COOPER.

THIS was an action of assumpsit brought to recover the sum of 196*l.* 19*s.* 6*d.* as the stipulated price of a quantity of hops sold by the plaintiff to the defendant.

The declaration contained the usual counts, in *indebitatus assumpsit*. The defendant had paid into court the whole amount of the debt except 15*l.*

Marryatt for the defendant stated, that he was in a situation to prove, that the hops delivered did not answer the sample according to which they had been sold, that, on the contrary, three different kinds of hops had been included in every sack.

Goods having been sold to the defendant by sample, at a stipulated price, he cannot, after payment of money into court, in an action of *indebitatus assumpsit*, insist upon any defect in the goods, since by the payment of money into court, he admits the original contract.

If a purchaser mean to insist on such an objection, he ought to return the goods.

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LEGGETT

v.

COOPER.

Lord ELLENBOROUGH intimated, that by the payment of money into court, the defendant had precluded himself from going into such evidence.

Marryatt contended that the defendant was entitled on a *quantum meruit* to go into this evidence. Notice, he said, had been given soon after the delivery, of the defective quality of the hops, and a communication had taken place on the subject of making a reasonable abatement, and no application had been made for a return of the hops, and that according to the course of the trade, an abatement ought to be made.

Lord ELLENBOROUGH. — If the defendant had meant to make his stand upon this objection, he ought to have made it earlier, and not have paid money into court, the effect of the objection is to avoid the contract altogether, but by the payment of money into court he has admitted it. He has lost the ground of defence upon which, perhaps, he might otherwise have insisted, by neglecting to make the objection in proper time, and return the goods. If there is no contract for the sale of the goods at the stipulated price, there is no contract upon the *quantum meruit* for goods sold and delivered.

Verdict for the plaintiff, damages 15*l.* 0*s.* 3*d.*

Gurney and Chitty for the plaintiff.

Marryatt for the defendant.

LANO v. NEALE.

1817.

THIS was an action of special assumpsit. The declaration stated that the defendant had sold to the plaintiff, a certain ship with forty tons of iron kintlage for a large sum of money, to wit, the sum of 1500*l.*, and alleged by way of breach, that there were not forty, but only seven tons of kintlage.

It appeared that the ship in question having been offered for sale, and the plaintiff wishing to become the purchaser, a conditional contract had been entered into between the defendant and the plaintiff's agent to the following effect: — Bought of ——— *Neale*, on the account of *Pedro Lano*, the *French* built brig the *Triton*, with her stores, boats, and forty tons of iron kintlage, to be put into dry dock by the seller, for the sum of 1600*l.*

Marryatt for the plaintiff, was proceeding to go into evidence, to shew that after the vessel had been put into a dry dock by the defendant, it was discovered that her coppers were deficient, and that an abatement in the price had been made on that account. But upon its being objected that the bill of sale must be considered as the final contract by which the parties were bound, the bill of sale was produced, from which it appeared that "*Richard Neale*, in consideration of the sum of 1500*l.* to him paid by *Pedro Lano*, had sold to the latter

A contract is entered into for the sale of a ship, and a quantity of iron kintlage, for the sum of 1600*l.* but eventually a bill of sale is executed of the ship, together with all her stores, &c. in the usual form. In an action of assumpsit on the sale of the ship and kintlage, for the non-delivery of the kintlage, the bill of sale is the only contract that can be considered as obligatory on the parties, and the plaintiff cannot recover

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latter all the ship or vessel called the *Triton*, lately condemned as prize, but then in the river *Thames*, with all her stores, tackle, apparel, &c. in the usual form, without making any mention of iron kintlage.

It appeared that the iron kintlage was a species of ballast, and that in fact 1500*l.* had been paid.

Scarlett for the defendant, contended that the bill of sale being the final contract between the parties, was the only contract that could be considered in that action, and that contract made no mention of any iron kintlage. That the reduction of the original amount of the purchase money from 1600*l.* to 1500*l.*, might be accounted for on the supposition that the parties to the latter contract, had agreed that the iron kintlage should be left out.

Marryatt for the plaintiff, contended that the bill of sale was not inconsistent with the contract for kintlage; it might be considered as part of the stores of the vessel, and it was in fact as necessary as boats or oars. He said that he was prepared with documentary evidence, to shew why the abatement had been made, and that it had in fact been made on account of a defect in the bottom of the vessel, but —

Lord ELLENBOROUGH was of opinion, that the only contract which could be considered was the final contract contained in the bill of sale. This

made no mention of any kintlage, and it could not be considered as part of the ship or necessary stores, since common ballast might have been used, and that the contract could not be divided into different branches by means of evidence, so as to retain the original contract with respect to the kintlage, and to apply the latter and final contract to the ship alone.

The plaintiff was accordingly nonsuited.

Marryatt and Bolland for the plaintiff.

Scarlett and Campbell for the defendant.

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GALE and Another v. LECKIE.

THIS was an action of special assumpsit, to recover damages against the defendant, for refusing to proceed in the publication of a literary work which he had undertaken.

The plaintiffs were booksellers and publishers, and the defendant had entered into a written contract with them, in which it was recited that the defendant had then ready for the press, a work to be entitled, "An Historical Inquiry into the Balance of Power in Europe;" and it was agreed that this work should be published at the sole

A. agrees to supply B. with a manuscript work to be printed by B., the profits of which are to be equally divided. B. may maintain an action at law against A. for refusing to supply the manuscript. For this is not an action for

partnership profits, but for refusing to contribute the labour of the defendant towards the attainment of profits. It would be a good defence to such an action, to shew that the intended publication was of an illegal nature, but this is not to be presumed, the work itself not being produced.

expence

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expence of the plaintiffs, and that the profits should be divided between the author and publishers; that the defendant should supply the plaintiffs with the manuscript, and that in case the plaintiffs should decline to publish a second edition, the defendant should be at liberty to do so without the plaintiffs' interference.

It appeared that the work of printing went on to the extent of 336 pages, when the defendant declined to supply any further materials, signifying upon one occasion, that his *incarceration* would be the consequence of his completing the contract, and upon another, he assigned a ludicrous reason for refusing to proceed, saying, that he was apprehensive of a prosecution by the Pope.

Scarlett for the defendant, objected that the action was not maintainable, since it was brought by one partner against another, in order to recover partnership profits.

LORD ELLENBOROUGH. — I cannot accede to this objection; the action is not brought against the defendant to recover partnership profits, but for not contributing his labour towards the attainment of profits to be subsequently divided between the parties. I have known similar actions brought in several cases, for instance, actions for not entering into partnership according to an agreement.

Scarlett afterwards addressed the jury on the subject

ject of damages, observing on the difficulty of their calculating damages for the supposed loss of contingent profits, and insisting also that no damages could be recovered against the defendant for refusing to publish that which he deemed to be illegal, since the plaintiffs could not be considered as entitled to any legal interest in an illegal publication.

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LORD ELLENBOROUGH after stating to the jury the nature of the contract between the parties, said — You have been addressed by the counsel for the defendant on the subject of profits which have been represented as visionary, but is not the person who contracted to supply the materials, bound to proceed with the work in order to ascertain whether he can realize such profits; by his refusal he puts it out of the power of the party with whom he contracts, to derive any profits, and the contract was entered into on the supposition that the work would be profitable. — The defendant wrongfully withdraws himself from the performance of his contract; whether in consequence an injury has been sustained by the plaintiffs, to the amount contended for, is for your consideration. He says, that he withdrew himself that he might not subject himself to a prosecution, but without proof to the contrary, it is to be presumed that the composition was innocent, if indeed it had been of a different nature, he might have founded his defence upon that ground; he might have said, I now feel convinced that this work cannot be committed to the press with safety, that it is not a proper

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proper one for me to publish, or for you to print ; here I will pause and will proceed no further in that which will place both of us in peril ; but are you to assume all this without evidence when the work itself might have been submitted to you?

On the one hand you are called upon to assume that this work would have produced certain profit, on the other you are desired to take for granted, that dangerous consequences would have resulted from publication, and the defendant insists that he was not bound to publish that which was noxious and illegal ; but the work itself might have been produced, and you cannot presume all this, when you might have had positive evidence of the fact ; in the absence of that proof, you ought not to form such a presumption, and therefore this ground of defence fails. The main question therefore for your consideration is the amount of the damages ; you will no doubt indemnify the plaintiffs against the expences which they have incurred in paper and in printing ; it is a waste of time to say, that to this they are entitled in the strictest justice. The sum of 90*l.* has been stated by the witnesses as the amount of the profit which would probably have been derived from the first edition, and it is doubtful whether it would have reached a second.

The publication was to have been at the entire risk of the plaintiffs, they might have incurred a loss, but the defendant could not. — After some further comments by his Lordship upon the evidence, the jury found a verdict for the plaintiff, damages

damages 156*l.* 10*s.*, being 50*l.* more than the amount of the paper and printing.

Gurney and Puller for the plaintiffs.

Scarlett and Denman for the defendant.

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and Another
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GUILDHALL.

REX v. WOOLLER.

TWO informations had been filed against the defendant for the composing and publishing of two libels.

After the summing up by ABBOTT, J., on the trial of the first information, the jury retired to consider of their verdict, and the second information came on to be tried. During the second trial the first jury returned, and the door upon the left hand side of the Judge was opened to admit them. As soon as the reply was finished, the names of the first jury were all called over, and each of them answered, but the box being occupied by the second jury, the foreman and three other jurymen only appeared in view of the court, the others answering to their names from a small room behind the Judge's seat, and separated from the court by a wooden partition. The foreman upon verdict pronounced by the Foreman, the Court will with the consent of the defendant grant a new trial.

In general the assent of all the jury to the verdict pronounced by the Foreman in their presence and hearing, is to be conclusively inferred.

And no affidavit can in any case be admitted to the contrary.

But if all the jury were not present when a verdict of guilty was delivered, and it is therefore uncertain whether they all heard the

the

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the usual question being put by the officer of the court, answered that they found the defendant guilty, but that three of the jurymen wished to add something.

ABBOTT, J., said that he could not hear any statement by part only of the jury, that the verdict must be the verdict of all; and that if they chose to return a qualified verdict, he was ready to receive it, and his Lordship then asked in an audible voice, whether they were all agreed in their verdict of guilty, the foreman answered, that they were, and no dissent was expressed by any of the jury, and the verdict was recorded. His Lordship then proceeded to sum up the evidence to the jury in the second cause; and after the jury had retired in order to consider of their verdict: —

Chitty on behalf of some of the jury, stated to the Court, that they did not all concur in the verdict, but wished it to be received with some qualification, that they could not get into the court when the verdict had been given, and had not heard what had passed.

His Lordship said, that the verdict having been given, it appeared to him that he could not do any thing sitting there; and that it would be extremely dangerous, after the jury had retired from the bar, to receive such a communication, and he therefore thought that he could not in any way interfere.

Imme-

Immediately after the judges of the Court of King's Bench had taken their seats upon the first day of the ensuing term, ABBOTT, J., stated the preceding facts, adding, that since all the jury were not in court at the time when the verdict was delivered, it was possible that all the jury might not have heard what passed.

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After a short conference amongst the judges —

LORD ELLENBOROUGH said: The Court cannot, according to established form and precedent, receive the affidavit of a jurymen in any case; but the reason is, that in general, from the circumstances, it must be intended, that the verdict was given with his assent, and his assent must be inferred from his having consented that the foreman should deliver the verdict which is delivered in his hearing. The doubt in this case is, whether all the jury did hear what was said by the foreman on their behalf; they were not all within sight, and therefore we have not the ordinary means in this instance which exist in others, of knowing that the jury assented to what was propounded on their behalf by the foreman. This distinguishes the present case from those which usually occur, where every individual of the jury hears what is said, and has it in his power to dissent; there the evidence is complete, that he knew what passed, and his not dissenting is conclusive to shew his approbation of the verdict. These means in this case seem to be wanting, and therefore it is proper to

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consider whether the defendant should not be allowed to have a new trial if he be so disposed.

Shepherd, A.G., suggested to the Court, whether the fact, that some of the jury did not hear the verdict pronounced, should not be stated by affidavit.

LORD ELLENBOROUGH. — The Court think that they are shut out from acquiring any knowledge of the fact by means of an affidavit. From the statement made by the learned judge who tried the cause, it appears that the verdict was given under circumstances which render it doubtful whether the usual assent was given by all the jury to the verdict delivered by the foreman. The danger would be infinite if an affidavit could be received from a jurymen for the purpose of setting aside a verdict.

BAYLEY, J. — I concur entirely in every observation which has been made by my Lord in this case. The jury were not all in view when the verdict was given, and the learned judge who tried the cause has himself expressed a doubt whether all the jury heard what passed, and the matter was mentioned to the Court at as early an opportunity as it could have been with decency.

HOLROYD, J. — I do not see how the Court could with propriety proceed to pass judgment upon
upon

upon the defendant under the circumstances now disclosed.

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The Attorney-General then said, that he himself moved for a new trial.

Lord ELLENBOROUGH. — On the motion of Mr. Attorney-General, and with the consent of the defendant, let there be a new trial.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

In Trinity Term,

57 GEORGE III.

SITTINGS AT WESTMINSTER

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REX v. JAMES WATSON.

A witness in high treason is described in the list delivered to the prisoner under the statute, as lately abiding at a specified place. Upon examination of the witness upon the *voir dire*, it appears that he has had a different and later place of residence, the description is not sufficient.

THIS was a trial at bar, upon an indictment against *James Watson* the elder for high treason, founded upon the statutes 25 E. 3. st. 5. c. 2., and the 36 G. 3. c. 7. (a)

John Crisp having been sworn as a witness for the Crown, it was objected on the part of the defendant that he could not be examined, on the ground that he had not been sufficiently described in the list of witnesses delivered under the statute.

The

(a) The general nature of the charge and complexion of the evidence, will be collected from the indictment itself, sufficiently to enable

The witness was described in the list as "*John Crisp*, lately abiding at No. 3. *Tylers-court*, "*Wardour-street*, in the county of *Middlesex*, "*grocer ;*"

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ble the reader to understand the points which occurred upon the trial.

Middlesex. BE IT REMEMBERED that on Tuesday next after three weeks from the Feast Day of Easter in the Fifty-seventh Year of the Reign of our Sovereign Lord George the Third by the Grace of God of the United Kingdom of Great Britain and Ireland King Defender of the Faith in the Court of our said Lord the King before the King himself at Westminster in the County of Middlesex Upon the Oath of George Read Esquire &c. [*setting out the names of all the Grand Jurors*] Good and lawful men of the said County of Middlesex now here sworn and charged to enquire for our said Lord the King for the Body of the said County

It is presented as followeth, that is to say

Middlesex to Wit THE JURORS for our Lord the KING upon their Oath present That ARTHUR THISTLEWOOD late of the parish of Saint Andrew Holborn in the county of Middlesex gentleman JAMES WATSON the elder late of the parish of Saint George Bloomsbury in the same county surgeon JAMES WATSON the younger late of the same place surgeon THOMAS PRESTON late of London cordwainer and JOHN HOOPER late of the parish of Saint Ann within the liberty of Westminster in the said

county of Middlesex labourer Being Subjects of our said Lord the King not having the Fear of God in their hearts nor weighing the Duty of their Allegiance but being moved and seduced by the Instigation of the Devil as false Traitors against our said Lord the King and wholly withdrawing the Love Obedience Fidelity and Allegiance which every true and faithful Subject of our said Lord the King should and of right ought to bear towards our said Lord the King on the first day of November in the fifty-seventh year of the Reign of our said present Sovereign Lord GEORGE THE THIRD by the Grace of God of the United Kingdom of Great Britain and Ireland King Defender of the Faith and on divers other Days and Times as well before as after with Force and Arms at the parish of Saint James Clerkwell in the county of Middlesex maliciously and traitorously amongst themselves and together with divers other false Traitors whose names are to the said Jurors unknown did compass imagine and intend to move and excite Insurrection Rebellion and War against our said Lord the King within this Kingdom and to subvert and alter the Legislature Rule and government now duly and happily established within this Kingdom and to bring and put our said Lord the King to Death AND TO FULFIL perfect and bring to Effect

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“grocer;” and the statute 7 Ann. c. 21. s. 14. requiring “that when any person is indicted for “high treason a list of the witnesses who shall be “produced

Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on *the said first day of November in the fifty-seventh year of the Reign* aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did assemble meet conspire and consult among themselves and together with divers other false Traitors whose names are to the said Jurors unknown to devise arrange and mature Plans and Means to subvert and destroy the Constitution and Government of this Realm as by Law established and to deprive and depose our said Lord the King of and from the Style Honour and Kingly Name of the Imperial Crown of this Realm AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign afore-

said and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did assemble meet conspire consult and agree among themselves and together with divers other false Traitors whose Names are to the said Jurors unknown to stir up raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm and to subvert and destroy the Constitution and Government of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said County of Middlesex maliciously and traitorously *did assemble meet conspire consult and agree amongst themselves and together with divers other false Traitors whose names are to the said Jurors unknown with Force and Arms to attack and seize upon the*

“ produced on the trial for proving the said in-
 “ dictment and of the jury, mentioning the names,
 “ professions, and places of abode of the said
 “ witnesses

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the Bank of England and the King's Tower of London and to seize and take possession of divers Ordnance Warlike Weapons Arms and Ammunition therein and in divers other Magazines and Places deposited and being with intent by and with the said Ordnance Weapons Arms and Ammunition to arm themselves and other false Traitors and to attack fight with kill and destroy the Soldiers Troops and forces of our said Lord the King and other his liege and faithful Subjects and to raise levy and make Insurrection Rebellion and War against our said Lord the King within this Realm and to subvert and destroy the Constitution and Government of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did conspire consult agree attempt and endeavour to seduce divers Soldiers

serving in the Land Forces of our said Lord the King, and also divers other liege Subjects of our said Lord the King from their Duty and Allegiance to our said Lord the King *and to move persuade and procure the same and other Soldiers and Subjects of our said Lord the King to associate and join themselves* with and be aiding and assisting to them the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper and divers other false Traitors in a wicked and traitorous Attempt by them the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper and divers other false Traitors to be made to subvert and destroy the Government and Constitution of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of

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“ witnesses and jurors shall be given at the same
 “ time that a copy of the indictment is delivered to
 “ the party indicted, and that copies of all indict-
 “ ments

Middlesex maliciously and traitorously did give Orders to a certain Person to wit one *Isaac Bentley* to manufacture and provide divers to wit Two Hundred and Fifty Iron Pike Heads and did purchase and receive of and from the said last-mentioned Person the said Iron Pike Heads with intent therewith to form Pikes and with such Pikes to arm themselves and divers other false Traitors in order to attack fight with kill and destroy the Soldiers Troops and Forces of our said Lord the King and other his liege and faithful Subjects and to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm and to subvert and destroy the Constitution and Government of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November, in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did purchase pro-

cure provide and have divers large Quantities of Arms to wit Swords and Pistols and divers large Quantities of Ammunition to wit Gunpowder Leaden Bullets and Slugs and also divers Flags Banners and Ensigns with intent therewith to arm and array themselves and divers other false Traitors in order to attack fight with kill and destroy the Soldiers Troops and Forces of our said Lord the King and other his liege and faithful subjects and to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm and to subvert and destroy the Constitution and Government of this Realm as by law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did assemble meet conspire consult and agree amongst themselves and together with divers other false Traitors whose names are

“ ments for the offence aforesaid, with such lists,
 “ shall be delivered to the party indicted ten days
 “ before the trial.” It was urged that the de-
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are to the said Jurors unknown to set Fire to burn and destroy divers Barracks of our said Lord the King used for the reception and residence of the Soldiers Troops and Forces of our said Lord the King in this Realm and to provide and prepare Combustibles and Materials to wit Tar Pitch Sulphur Resin Spirits of Wine Tallow and Turpentine for the purpose of setting Fire to burning and destroying the said Barracks AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex, maliciously and traitorously did make a proposal to and treat with and cause and procure a Proposal and Treaty to be made and had to and with a certain Person to wit one *Walter Cosser* concerning and for the Hire of a certain House and did then and there by such Proposal and Treaty endeavour to obtain and hire the said House for the purpose of depositing and keeping therein Combustibles and Materials to wit Tar Pitch Resin

Sulphur Spirits of Wine Tallow and Turpentine with intent to use the same in and for the setting Fire to burning and destroying of certain Barracks of our said Lord the King used for the reception and residence of the Soldiers Troops and Forces of our said Lord the King AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did conspire to procure and did by *Advertisements in the public Newspapers and by Placards and Hand-Bills and by divers other ways and means* invite divers and very large Numbers of the liege Subjects of our said Lord the King to assemble and meet together on divers Days and Times in a certain place commonly called *Spa Fields* in the said county of Middlesex with intent that divers of them the said Arthur Thistlewood James Watson the elder James

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scription of the witness as *lately* abiding was not sufficiently definite in point of time: it might mean two months or a year according to the vague appre-

James Watson the younger Thomas Preston and John Hooper and other false Traitors might make and utter in the presence and hearing of the Subjects of our said Lord the King to be so there assembled Seditious Inflammatory and Treasonable Speeches and Harangues and thereby move excite cause and procure the said last-mentioned Subjects to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the twenty-seventh day of November in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did make Applications and Proposals to and treat with and cause and procure Applications Proposals and Treaties to be made and had to and with divers Persons to wit one William Duke one John Richardson and one Frederick Windemude concerning and for the Hire of certain Waggon Stages Platforms and other Machines to be conveyed to the afore-

said place commonly called Spa Fields in the said county of Middlesex and there to be used for the purpose that divers of them the said Arthur Thistlewood, James Watson the elder James Watson the younger Thomas Preston and John Hooper and other false Traitors should thereupon and therefrom make and utter Seditious Inflammatory and Treasonable Speeches and Harangues to divers Subjects of our said Lord the King there to be assembled in order thereby to move excite cause and procure the same Subjects to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm AND FURTHER TO FULFIL perfect and to bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the twenty-eighth day of November in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did treat for hire and engage a certain Waggon and divers to wit Two Horses and afterwards to wit on the second day of December in the fifty-seventh year of the Reign aforesaid at

apprehension of the person who used an expression in itself so indefinite. That the objection was not to a mere matter of form, since the intention of the

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at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did provide and cause to be placed in the same *Waggon divers large quantities of Ammunition to wit Gunpowder Shot Leaden Bullets and Slugs and divers Flags Banners and Ensigns and did cause the same Waggon with the said Ammunition and the said Flags Banners and Ensigns therein to be drawn to the aforesaid place called Spa Fields in the said county of Middlesex and did provide divers Ribbons and Cockades and did ascend and get into the same Waggon and did exhibit and display to great Numbers to wit Five Thousand and more of the Subjects of our said Lord the King there then being the said Flags Banners and Ensigns and also the said Ribbons and Cockades and the said James Watson the elder and James Watson the younger with Force and Arms maliciously and traitorously did then and there to wit at the said parish of Saint James Clerkenwell in the said county of Middlesex respectively make and with loud Voices utter to and in the presence and hearing of the said Subjects of our said Lord the King so then there being *Seditious Inflammatory and Treasonable Speeches and Harangues* and the said James Watson the younger with Force and Arms maliciously and traitorously did*

then and there seize and take into his hands one of the said Flags and did call upon and invite the said Subjects of our said Lord the King so then there being to follow him the said James Watson the younger they the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper then and there meaning and intending by means of the several Premises aforesaid to move excite cause and procure the said Subjects of our said Lord the King so there then being to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm and to subvert and destroy the Constitution and Government of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said second day of December in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously together with a very great Number to wit One Thousand and more of the Subjects of our said Lord

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the legislature in requiring an identical description of the witness and his residence was, that it might operate as a notice to the party accused, to enable him

Lord the King whose names are to the said Jurors unknown then and there assembled with Flags Banners and Ensigns Ribbons and Cockades and also with divers offensive Weapons, to wit Swords Guns Pistols Sticks and Staves did parade and march with great noise and violence through divers public Streets and Highways and in the said public Streets and Highways did brandish and exhibit the said Swords and other offensive weapons and fire off and discharge the said Guns and Pistols and did attack and beset the Houses and Shops of divers Gunsmiths and Dealers in Arms and did seize and take divers large quantities of Arms to wit Swords Guns and Pistols with intent by and with the said last-mentioned Arms further to arm themselves and other false Traitors in order to attack fight with kill and destroy the Soldiers Troops and Forces of our said Lord the King and other his liege and faithful Subjects and to raise make and levy Insurrection Rebellion and War against our said Lord the King within this Realm and thereby to subvert and destroy the Constitution and Government of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the

younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said second day of December in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex maliciously and traitorously did proceed together with divers other false Traitors whose Names are to the said Jurors unknown to the King's Tower of London and *did with loud Voice address certain Soldiers serving in the Land Forces of our said Lord the King then being stationed in the said Tower and did invite and endeavour to seduce the same soldiers to open the Gates of the said Tower and to admit divers of the said false Traitors into the said Tower in order that the said last-mentioned false Traitors might enter into the said Tower and take Possession thereof and of the Ordnance Stores Arms and Ammunition therein deposited and being and to associate and join themselves the said last-mentioned Soldiers with and be aiding and assisting to them the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper in a wicked and traitorous Attempt to subvert and destroy the Government and Constitution of this Realm as by Law established AND FURTHER TO FULFIL perfect and bring to Effect their most*

him to make all the inquiries which he might conceive to be conducive to his defence: but that if the existing residence of the witness was not given,

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most evil and wicked Treason and Treasonable Compassing and Imagination aforesaid They the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper as such false Traitors as aforesaid on the said second day of December in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex together with a great Multitude of false Traitors whose Names are to the said Jurors unknown to the Number of One Thousand and more armed and arrayed in a Warlike manner that is to say with Flags Banners Ensigns Swords Pistols Clubs Bludgeons and other Weapons maliciously and traitorously did ordain prepare levy and make public War against our said Lord the King within this Realm In Contempt of our said Lord the King and his Laws to the evil Example of all others contrary to the Duty of the Allegiance of them the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper against the form of the Statute in such Case made and provided and against the Peace of our said Lord the King his Crown and dignity AND THE JURORS aforesaid upon their Oath aforesaid do further present That the said Arthur Thistlewood James Watson the elder James Watson

the younger Thomas Preston and John Hooper being Subjects of our said Lord the King not having the Fear of God in their hearts nor weighing the duty of their Allegiance but being moved and seduced by the Instigation of the Devil as false Traitors against our said Lord the King and wholly withdrawing the Love Obedience Fidelity and Allegiance which every true and faithful Subject of our said Lord the King should and of right ought to bear towards our said Lord the King on the said first day of November in the fifty-seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex *maliciously and traitorously amongst themselves and together with divers other false Traitors whose Names are to the said Jurors unknown did compass imagine invent devise and intend to deprive and depose our said Lord the King of and from the Style Honour and Kingly Name of the Imperial Crown of this Realm and the said last-mentioned Compassing Imagination Invention Device and Intention did then and there express utter and declare by divers overt Acts and Deeds hereinafter mentioned that is to say* IN ORDER TO FULFIL perfect and bring to Effect their most evil and wicked Treason and Treasonable

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given, this intention would be frustrated. That if such a description were to be sufficient for one witness it would suffice for all; and all the witnesses

able Compassing Imagination Invention Device and Intention last aforesaid They [*The overt acts were set out as in the last Count*] AND THE JURORS aforesaid upon their Oath aforesaid do further present that the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper being Subjects of our said Lord the King not having the Fear of God in their Hearts nor weighing the Duty of their Allegiance but being moved and seduced by the Instigation of the Devil as false Traitors against our said Lord the King and wholly withdrawing the Love Obedience Fidelity and Allegiance which every true and faithful Subject of our said Lord the King should and of right ought to bear towards our said Lord the King on the said second day of December in the fifty-seventh year of the Reign aforesaid with Force and Arms at the said parish of Saint James Clerkenwell in the said county of Middlesex together with a great Multitude of false Traitors whose names are to the said Jurors unknown to the Number of Five Thousand and more arrayed and armed in a Warlike manner that is to say with Flags Banners and Ensigns Swords Pistols Clubs Bludgeons and other Weapons being then and there unlawfully maliciously and traitorously assembled

and gathered together against our said Lord the King most wickedly maliciously and traitorously did levy and make War against our said Lord the King and being so assembled together arrayed and armed against our said Lord the King as aforesaid did then and there with great Force and Violence parade and march in an hostile manner through divers public Streets and Highways and did then and there maliciously and traitorously attempt and endeavour by Force and Arms to subvert and destroy the Government and Constitution of this Realm as by Law established and to deprive and depose our said Lord the King of and from the Style Honour and Kingly Name of the Imperial Crown of this Realm In Contempt of our said Lord the King and his Laws to the evil Example of all others contrary to the Duty of the Allegiance of them the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper against the form of the Statute in such Case made and provided and against the Peace of our said Lord the King his Crown and Dignity AND THE JURORS aforesaid upon their Oath aforesaid do further present That the said Arthur Thistlewood James Watson the elder James Watson the younger Thomas Preston and John Hooper being

nesses in the list might be described in this uncertain and indefinite mode.

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LORD ELLENBOROUGH observed, that with reference to the time of delivering the list, the description must necessarily be as *lately*, unless the person delivering the list was actually at the place at the time; and therefore that the place described as the place of residence must be that which it had lately been: but that it would be proper to inquire, as a matter of fact, when the witness was resident there.

Upon examining the witness, it appeared that he had left the residence described in the list about three months before the delivery of the list (5th of *May*); that he then went to reside at *Mill-wall*, where he remained about a month; from whence he went to *Ratcliffe-highway*, where

being Subjects of our said Lord the King not having the Fear of God in their Hearts nor weighing the Duty of their Allegiance but being moved and seduced by the Instigation of the Devil as false Traitors against our said Lord the King and wholly withdrawing the Love Obedience Fidelity and Allegiance which every true and faithful Subject of our said Lord the King should and of right ought to bear towards our said Lord the King on the said first day of November in the fifty seventh year of the Reign aforesaid and on divers other Days and Times as well before as after with Force and Arms at the said parish of Saint James Clerkenwell

in the said county of Middlesex maliciously and traitorously amongst themselves and together with divers other false Traitors whose Names are to the said Jurors unknown did compass imagine invent devise and intend to levy War against our said Lord the King within this Realm in order by Force and Constraint to compel him to change his Measures and Counsels and the said last-mentioned Compassing Imagination Invention Device and Intention did then and there express utter and declare by divers overt Acts and Deeds hereinafter mentioned that is to say [*setting out the same overt acts as in the First Count.*]

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he staid about a fortnight or three weeks, and then removed to *Chelsea*, where he still continued to reside. That he had never concealed himself, but had not stated, upon leaving *Tylers-court*, where he was to be found. It further appeared, that inquiry had been made on the part of the Crown at *Tylers-court* for the witness, previously to the delivery of the list, and that not being found there he had been described as *lately* residing there; but that no information having been procured there, no further inquiry had been prosecuted as to any later place of abode.

This was admitted by the *Attorney-General* on behalf of the Crown.

LORD ELLENBOROUGH. — Then it appears that *Tylers-court* was not the latest place of residence; and as it does not appear that any endeavour has been made to find him out after he left that place, he cannot be examined.

In order to identify a person in court with one whom the witness has described, the attention of the witness may be directed to the person in court, and he may be asked whether that is the person of whom he has spoken.

Upon its becoming necessary on the part of the Crown to identify three other prisoners, charged in the same indictment with the prisoner *Watson*, it was objected that the attention of the witness was too directly pointed to them. But the Court held, that the counsel for the prosecution might ask in the most direct terms whether any of the

prisoners

prisoners was the person meant and described by the witness. (a)

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It appeared that on the 26th of *November* a person of the name of *Castle* took a manuscript to *Seale*, a printer, in order that he might print 500 large copies for placards, and 4000 small ones, advertizing a meeting at *Spa Fields* on the 2d of *December*, and that the prisoner *Watson* afterwards called upon him, *Seale*, and took away 25 of the large placards. *Seale* upon the trial produced one of the large ones, and another witness was afterwards asked whether similar placards had not been posted upon the walls of the metropolis.

A great number of placards announcing a public meeting in *Spa Fields* having been printed, the prisoner takes 25 of them away from the printer's, one of the remaining placards may be read without any preparatory evidence as to the original manuscript, and without notice to the prisoner to produce the 25 copies.

It was objected for the prisoner, that no evidence of the contents could be received without notice to the prisoner to produce the original manuscript. That the original ought either to be produced, or proved to be destroyed, or in the possession of the prisoner. That notice must be proved to have been given to him to produce it before secondary evidence could be received. That all the printed placards were to be considered as copies, and not as originals; and that it by no means followed that all were alike because all were printed. And the case was assimilated to that of *Nodin v. Murray* (b), which was tried before Lord *Ellenborough*, where his Lordship held that a copy of a letter proved to have

(a) The same point was so ruled by Lord *Ellenborough* in the case of the *King* against *De Berenger* and others.

(b) 3 *Camp.* 228.

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been taken by a letter-copying machine, and which was therefore necessarily a true copy, could not be received in evidence without notice to produce the original. It was also urged that notice ought to have been given to produce the 25 copies which had been taken away by the prisoner.

LORD ELLENBOROUGH. — An order having been given to print 500 copies, *Watson* fetched away 25, by this he adopted the printing as done in the execution of an order which he had given; and when he took away 25 out of a common impression, they must be supposed to agree in the contents. When you wish to prove that a party has notice of the contents of a newspaper, you shew by one witness that he had a copy of the paper, and by another what the contents were.

BAYLEY, J. — The objection is, that without notice to produce the original any other evidence of the contents is but secondary evidence. It appears to me that that is not the case, for that every one of those worked off are originals, in the nature of duplicate originals; and it is clear that one duplicate may be given in evidence, without notice to produce the other. If the placard were offered in evidence, in order to shew the contents of the original manuscript, there would be great weight in the objection; but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must all be the same.

ABBOTT,

ABBOTT, J.—If this paper were offered in order to shew what were the contents of the original manuscript, it might be contended that sufficient preparatory evidence had not been given; but in another point of view it appears to me that the evidence is admissible, in order to prove that Mr. *Watson* knew the contents of a placard posted in the streets, relating to a meeting in *Spa Fields* on the 2d of *December*, and giving notice of it. The fact is proved that the printer, having printed a number of papers similar to the one produced, delivered 25 of them into the hands of *Watson* four days previous to the meeting. This, then, proves that *Watson* knew the contents of the placard posted in the streets relating to that meeting, and if he had notice of the contents of the placard it is evidence against him.

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HOLROYD, J.—I am of the same opinion. This is not a question of copy and original. A number of placards were printed by the order of two persons, and the prisoner took 25 of them away. None of these printed papers were originals more than the rest. The question is, whether the prisoner took away part of the impression, and whether that may be proved in the manner proposed. The evidence proves his knowledge of the contents of these placards; and I am of opinion that the one produced may be read.

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Evidence admitted of a seditious speech spoken by the prisoner, although not set out, in substance, as an overt act.

It was afterwards proved, that on the 2d of *December*, a great concourse of people was assembled in *Spa Fields*, some of whom bore flags and banners; that in the centre of the crowd there was a waggon, into which several persons ascended; and that Mr. *Watson* having ascended the waggon, addressed the people; the witness, at the instance of the counsel for the Crown, was about to state the prisoner's speech, which he had taken down in short-hand, when —

The counsel for the prisoner objected, that this evidence could not be given, since the speech had not been set out in substance, or otherwise as an overt act of treason on the face of the indictment. In support of this objection, the doctrine laid down in *East*, P. C. c. 2. s. 58., was referred to, and the cases of the *King v. Francia* (a), *The King v. Coleman* (b), *The King v. Lord Preston*, and *The King v. Staley* (c), were cited. It was urged, that in *Francia's* case, the object of the letter was stated in the indictment, viz. that it was to invite the King of *France* to send troops to this country. That in the cases of *Coleman* and *Lord Preston*, the substance and purport of the letters found upon them was set forth; and that in *Staley's* case, the words having been spoken in *French*, the purport of them was set out in *Latin*; and that in *Francia's* case, the rule had been laid down, that it is not

(a) 6 St. Tr. 73.

(b) 2 St. Tr. 661.

(c) 2 St. Tr. 665.

necessary

necessary to set out the letters themselves of a treasonable correspondence; but that it was sufficient to state the substance and effect of them, since they were evidence of the secret compassing and imagination of the heart. The doctrine laid down by Lord *Holt* in *Drake's* case (*a*), was also referred to, where he says, that a libel may be set out, either by the words, where the smallest variation would be fatal, or by the substance and effect, in which case it would be sufficient, if the sense were to be rightly stated. That, therefore, the substance of the words in this case ought to have been set out on the record, and they not have been described in general terms, as seditious and inflammatory speeches. It was also contended, that this was necessary, because treason was assigned in the indictment under the statute 36 G. 3., by which statute it is made treason to conspire to levy war to force and compel the King to change his measures; and that with reference to the count on that statute, it was material to know what the speech was, in order to know what the measures were which the conspirators proposed to compel the King to change.

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LORD ELLENBOROUGH inquired, in the course of the argument, whether any instance had ever occurred of a trial for high treason, in which a speech or consultation was stated in words, and his Lordship afterwards intimated, that he was clearly of opinion, that the speech was evidence under

(a) Salk. 660.

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the overt acts for levying war, it was evidence *quo animo*, the thing was done : and that if no such overt act had been laid, it was an universal rule of evidence, that what a party says may be given in evidence against him to explain his conduct.

BAYLEY, J., was of the same opinion, and referred to the rule laid down in *Francia's* case, where the indictment alleged as an overt act, that "the defendant did compose and write, &c. several traitorous letters, notifying the intention and resolution of him the said *Francis Francia*, &c., to move and levy war, and requiring aid in the said war of the said foreigners and other persons in *France*," that upon the objection in that case, that the letter ought to have been set out, the Court held that it was not necessary, since the overt act was sufficiently stated, and the letters were but evidence to prove that overt act. That, in the present case it was sufficiently stated as an overt act, that the prisoner made seditious, and treasonable, and inflammatory, harangues, and that the particular expressions which he used, were evidence to prove that overt act.

ABBOTT, J., also was of opinion, that the overt act was stated with sufficient certainty to warrant the Court in receiving the evidence, since it was alleged with as much certainty as had been usual in similar cases ; and he referred to *Hardy's* case ; he also intimated his opinion, that if no such overt act had been stated in the indictment, the evidence would still have been admissible, since what
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the prisoner himself said with respect to what was then passing, was to be received in evidence as explanatory of those proceedings, and to shew whether the insurrection and riot which afterwards occurred, amounted to a levying of war.

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HOLROYD, J., was also of opinion, that the overt act was sufficiently stated, as well as the object of it, and that the evidence could not be rejected, since several other overt acts were laid of consultation, and of conspiring to levy war, and to seduce the soldiery: and since the speeches uttered by the prisoner went to shew the nature and object of the conspiracy, they could not be rejected.

The same witness who took the short-hand note was cross-examined, as to his having delivered this note to the Under Secretary of State; and the Court having intimated a doubt whether such particulars could be inquired into —

A witness for the Crown cannot, on cross-examination, be compelled to state through what channel he made a disclosure to government, either immediately or mediately.

Wetherell contended, that he was at liberty to prosecute the inquiry, and he attempted to distinguish this case from that which was decided by the Court in *Mr. Tooke's* case, and in *Mr. Hardy's*. There it had been held, that the name of an informer upon grounds of public policy ought not to be disclosed, and the Court there made a distinction between protecting a third person and a member or servant of government, and no question

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was made that the name of a magistrate or accredited person might be asked, but —

ABBOTT, J., referring to a note of his own in *Hardy's* case, said, that it had been ruled by all the judges, that a witness could not be compelled, on cross-examination, to disclose the names of those to whom they had given information of the proceedings of the society, whether such persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government. In that case, a witness who conceived that the views of the society were dangerous, by the advice of a friend made a communication to government, and upon cross-examination, a question arose, whether he could be compelled to disclose the name of that friend; and it was held by Lord Chief Justice EYRE, Mr. Baron HOTHAM, and Mr. Justice GROSE, that he could not; *contra*, by the Lord Chief Baron and Mr. Justice BULLER.

Wetherell contended, that he was at liberty to inquire through what officer of government the communication had been made, but —

Lord ELLENBOROUGH said, that a communication to a member of government, was a communication to government; and that it could not be asked whether a communication had been made

made by that person to government, and that Lord KENYON had so decided in *Stone's* case. (a)

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Evidence was given by *Castle*, an accomplice, that he, together with the prisoners charged in the indictment, had entered into a treasonable conspiracy, and that in pursuance of this conspiracy, a number of pikes had been directed to be made by one *Bentley*. That the prisoner *Watson* gave to his son, *Watson* junior, money to go to *Bentley's* to pay for the pikes, and to take them to the lodging of *Watson* junior, in *Hyde Street, Bloomsbury*. That *Watson* junior and *Castle* accordingly went for the pikes and carried them to *Hyde Street*, and that this was afterwards reported to *Watson* senior. It also appeared, that the elder *Watson* had some time before this taken an apartment for his son in *Hyde Street*, to be used as a shop. That the two *Watsons* frequently came to the lodgings together, and that the last time they were seen there, was on the 18th or 20th of *November*. The counsel for the Crown proposed to prove, that on the 5th of *March* following, a number of pikes were discovered secreted in the privy of this house.

In treason and felony evidence may be given of the finding articles secreted, although they were found at a time subsequent to the prisoners' apprehension.

Wetherell for the prisoner objected, that the finding these articles in such a situation so long after the apprehension of the prisoner (the 2d of *December*),

(a) See the case 6 T. R. 529. but this point is not reported there.

could

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could not be given in evidence against him, principally on the ground, that after the arrest of a prisoner, neither papers nor any other articles found in his house could be offered in evidence against him, and he referred to *Hardy's* case, where, when it was proposed to give in evidence, papers found in the possession of *Martin* and *Thetwall*, the *Attorney-General* said, that although the papers were found after the apprehension of *Hardy*, he should prove that they existed previously; when *Mr. Gibbs* objected, that the admission of those papers in evidence would be in direct contradiction of the rule which their Lordships had laid down, not to receive any document found after the apprehension of *Hardy*; upon which Lord Chief Justice EYRE said, "the only ground of the rule is, That being found afterwards, it possibly might not exist previously, and therefore there was no proof that the prisoner was a party to it; but if they remove that objection, and shew that in fact it did exist before his apprehension, the objection exists no longer." That in conformity with this rule, the evidence proposed was not receivable. That the rule was, that after a person is taken, nothing found in his house, whether papers or implements, supposed to be in his possession could be received, since they might have been placed there for purposes inconsistent with justice.

But the Court were clearly of opinion, that the evidence was admissible. In the case cited, that

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which

which was offered to be produced in evidence did not exist before the apprehension, but here the thing not only existed, but, according to the evidence, had been carried to the house by two of those who had been stated to be parties to the transaction. It had been sworn, not only that the prisoner had been privy to the ordering of these pikes, but that it had afterwards been communicated by the younger *Watson* to the prisoner, that they had been carried to the place near to which they were found, and Lord ELLENBOROUGH cited a case from recollection, where a butler to a banker at *Malton* had been taken up upon suspicion of having committed a great robbery. The prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at *York*, at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted; he had been separated from the custody of the plate, since he had been confined in *York Castle* for some time, but no doubt was entertained as to the admissibility of the evidence, and ABBOTT, J., observed, that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension.

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Papers found in the lodgings of a co-conspirator at a period subsequent to the apprehension of the prisoner may be read in evidence, although no *absolute proof* be given of their previous existence where strong presumption exists that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers are intimately connected with the objects of the conspiracy as detailed in evidence.

It was in evidence that on the 5th of *December*, after the meeting in *Spa Fields*, which was on the 2d, the lodgings of the younger *Watson*, in *Hyde-street Bloomsbury*, had been searched, and a number of papers found there by the witness who produced them; it also appeared that the younger *Watson* kept the key of the shop in which these papers were found, and that no one had access to it but himself, and that he had not been seen there since the 18th of the preceding *November*, and that he had absconded on the 2d of *December*; upon one of these papers was a plan of the Tower, a second exhibited a machine armed with scythes, intended for the purpose of clearing the streets of cavalry, and a third contained a list of names. A witness (*Castle*) had also stated that it was the intention of the conspirators to excite a general insurrection on the 2d of *December*, to take possession of the Bank, &c., to subvert the existing government, and to substitute a committee of public safety; and that a list of names, a plan of the Tower, and a plan of a machine for destroying cavalry had been shewn to him in furtherance of the general design.

Wetherell opposed the reception of these documents in evidence on the ground of his former objection, the want of proof that these papers had any existence previous to the apprehension of the prisoner, and again referred to the rule laid down in *Hardy's* case.

But

But the Court, referring to the evidence already given, were clearly of opinion that these papers were admissible, since, in the first place, there was a strong presumption that the papers found in the room were there and in the same state previous to the 2d of *December*, and therefore previous to the apprehension of the prisoner; a circumstance which very materially distinguished the present case from that of *Hardy's*, where the papers were found in the possession of persons after his apprehension, which persons might have acquired the possession after his apprehension; whereas in the present case the room in which the papers were found had been kept locked up by one of the conspirators; and secondly, because these papers had all a reference to the design and plan of the conspiracy as detailed in evidence; but the Court seemed to be of opinion that an indorsement upon the plan of the machine, which did not appear to be at all connected with the general design, was not admissible in evidence.

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It was proposed to read another of these papers in evidence containing *inter alia* the following questions and answers. “How long ought soldiers
 “to obey their commanders? As long as the
 “orders of their commanders are founded on jus-
 “tice.—Can any conduct of commanders tolerate

Qu. whether
 seditious ques-
 tions and an-
 swers found in
 the possession
 of a co-conspi-
 rator, but not
 published may
 not from their

close connection with the nature and object of the conspiracy be read in evidence, although no positive and direct proof be given that use was to be made of this or any other such instrument, in furtherance of the design. If such positive evidence were to be given, the document would certainly be admissible.

“disobedience

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“ disobedience of orders ? When orders to support
 “ tyranny and oppression, and increase distress are
 “ given contrary to the will and interests of a
 “ nation, the commanders are unjust, and injus-
 “ tice ought never to be obeyed.—Ought soldiers
 “ to be the judges of their country’s wrongs ?
 “ Soldiers are men ; they have feelings in common
 “ with their brethren, and can judge when rulers
 “ oppress the people.—When rulers are oppressors
 “ and have ruined a country, is it right in
 “ soldiers to disobey commanders ? Soldiers
 “ ought not to be mercenaries ; they are a part
 “ of the people ; they ought not to add to the mi-
 “ series of their starving industrious brethren ;
 “ they are paid to cherish and protect them, and
 “ not to destroy them,” &c. &c.

Wetherell and *Copley*, Serjt., for the prisoner,
 contended that this could not be received in evi-
 dence. If it had been previously proved that it
 had been proposed to distribute amongst the
 soldiery papers or placards tending to withdraw
 them from their allegiance, such a paper might
 be evidence, since then there would be a con-
 nection between the means used and the object
 to be attained ; but that it was not competent
 to the counsel for the prosecution to produce out
 of a man’s scrutoire a series of written questions
 and answers without any proof that it had ever
 been printed or proposed to be printed, or that
 any attempt had been made to circulate it. The
 effect of reading such a paper in evidence would
 be

be the same as if a plan had been proved to subvert military discipline by the publication of papers, and as if they had proved that it was printed. That a paper found in a man's desk was not to be offered in evidence against him, in the same way as if it had been printed and circulated. That the case fell within the rule of evidence established in *Sidney's* case: in that case there had been no publication; the paper contained nothing more than abstract principles; that in *Sidney's* case the treatise contained republican principles, but that this was a treatise on a question which every man had a right to discuss; and that a treatise on a speculative subject, confined to a man's closet, ought not to be adduced to shew that he had entered into any criminal conspiracy. That although there was upon the record a charge of attempts to seduce soldiers, and although evidence had been given of what was called a tampering with soldiers, yet still this evidence was not admissible without previous evidence either of an actual publication of the paper or of a proposal to publish it. That the reception of this evidence would introduce a boundless latitude of evidence, for if a paper could be read relating to the seduction of soldiers from their allegiance, any paper might be read which had reference to the subverting any man from his allegiance. Suppose a seditious song had been found, which had no reference either to the soldiers or to the army, would that have been evidence? If so, then, any paper, in any manner connected with

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with the government and constitution of the country, would be receivable in evidence, although no charge was made out on the record, nor any evidence produced of an intention of making such a publication, there would be no marks or boundaries for the exclusion of any papers. It was also insisted that there was no evidence that this paper was in the hand-writing of Mr. *Watson*, or of any one of the conspirators, it did not appear then that this was the result of young *Watson's* own conviction; for any thing which appeared to the contrary, they might have been handed to him, and he might have taken them with a view to refuting them and shewing their fallacy.

The Attorney-General for the Crown contended at some length that this case differed essentially from *Sidney's* case; and that this paper having been found in the possession of one of the persons charged, was actually connected with, and confirmed their proceedings as stated in the evidence, when the Court informed him that he need not labour to shew the entire diversity between this case and Mr. *Sidney's*. That the question here was, how he could apply this evidence as conducive to effectuating any of the purposes of the conspiracy; it had been proved that communications had been made to soldiers, but did the paper relate to any measure to be adopted for the corruption of soldiers? There was no evidence that it was intended to circulate papers in the shape

of question and answer to corrupt the minds of the soldiers. If it had appeared that such publications were in contemplation, and that the paper had remained in the possession of the party for this purpose, it would have been evidence of that purpose, and in that point of view might have been admissible ; but the difficulty was, how it tended to effectuate any of the objects of the conspiracy stated in evidence.

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The *Attorney-General* answered, that although there was no evidence of an intention to circulate papers amongst the soldiers, there was evidence to shew that they had entered into conversation with the soldiers for the purpose of persuading them not to act against the conspirators, and to render them dissatisfied with their officers and the government, and for the purpose of drawing those soldiers from their allegiance and duty. But ultimately finding that the Court entertained doubts as to the admissibility of this evidence, the *Attorney-General* withdrew it from the consideration of the Court.

Lord ELLENBOROUGH observed, that where a doubt existed, his inclination was to reject a paper offered against a defendant in such a case. That if there had been proof of a design to corrupt the soldiers by written papers circulated amongst them, this would have been evidence of a paper to effectuate that purpose ; but that at present the contents of the paper appeared to be of too

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abstract a nature, and too little connected with any object of the conspiracy then in evidence, and that therefore it would be more safe to reject the evidence, although it might bear much argument independent of *Sidney's* case.

BAYLEY, J., said, that he was by no means prepared to say that this paper was not admissible in evidence ; but thought it so doubtful that he was of opinion that the Attorney-General had done right in withdrawing it. He said that his doubt was this, that it was in evidence that the conspirators went about to different public-houses in order to address the soldiers, and that if it had clearly appeared that the contents of this paper were intended to have been made use of in furtherance of the common purpose, he should have thought it receivable in evidence ; but that it did not appear to have been so intended, and therefore it was possible that it might be a collection of questions and answers intended to be used by young *Watson* himself, without reference to any common purpose or design ; there was no doubt that the act of any one co-conspirator in furtherance of a common design was evidence against all ; and it was doubtful whether a collection of treasonable questions and answers might not be materials in furtherance of the design ; but that the question was so far doubtful that the safer course was to permit the evidence to be withdrawn.

ABBOTT,

ABBOTT, J., said, that if the Court had been called upon decide upon the question, he should have wished, before he gave any opinion, to have heard the argument upon it, since he thought the question one of considerable difficulty. That the argument against the reception of the evidence was founded upon a supposed similarity between this paper and the paper in *Sidney's* case. That he had always understood that the ground of objection in that case was not, that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to Mr. *East's* Pleas of the Crown, 119., where it is said, "writings plainly applicable to some treasonable design in contemplation, are clear and satisfactory evidence of such design, although not published. If, say Mr. Justice *Foster* and Mr. Justice *Blackstone*, the papers found in *Sidney's* closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him." That was the objection which had constantly been made to the reception of the evidence in *Sidney's* case. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. That he entertained considerable doubt upon the present question; but that his present opinion was, that the paper was too abstract in its terms to be admissible; and that he had said so much upon the present question, in order

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to prevent any mistake from going abroad in consequence of *Sidney's* case having been assimilated to this.

HOLROYD, J., was of opinion, that the case was very distinguishable from *Sidney's*, and that he should have wished for further argument before he had decided upon the subject; assuming it to be admissible, it would have been evidence only, as a thing done in furtherance of the general intention of the parties, and as confirmatory of that intention.

An officer of the Tower not permitted to prove that a particular plan of the Tower, produced by the defendant is a correct one.

A clerk of the works in the ordnance department, who had resided many years in the *Tower*, was afterwards called, for the purpose of proving that the plan found at the lodgings of young *Watson*, was a plan of a part of the interior of the *Tower*; having proved this to be the case, he was afterwards asked upon cross-examination, whether another printed plan (which was shewn him) upon a regular scale, was a correct plan of the *Tower*, for the purpose of shewing that such maps might be purchased without difficulty in the shops in *London*; but —

The Court held, that it might be attended with public mischief, to allow an officer of the tower to be examined as to the accuracy of such a plan.

Wetherell

Wetherell said, that he merely meant to shew that a plan of the *Tower*, upon a military scale, might be purchased at any shop in *London*; but that he had no wish to press the question.

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BAYLEY, J., said, that he might prove that prints containing a plan of the *Tower* might be purchased, but that he could not ask the officer whether they were accurate.

In the course of the evidence adduced on he part of the prisoner, it was proposed to prove the certificate of the marriage of *John Castle* with *Elizabeth Streeter*. *Castle* had been examined as a witness for the Crown, and had stated himself to be an accomplice in the treasons charged against the prisoner, and upon his cross-examination, had admitted that he had been guilty of several crimes. He had not been asked whether he had been guilty of bigamy, but the establishment of the marriage to which this certificate related, would, when coupled with his own admission of another previous marriage with a woman still living, have proved that he was guilty of bigamy.

Evidence of a particular collateral fact cannot be adduced in any case, whether civil or criminal, in order to discredit a witness.

The only modes of impeaching the credit of a witness, are by cross-examination, by producing the record of his conviction of some crime, or by adducing general evidence that he is unworthy of being believed upon his oath.

If a witness be

asked as to a collateral fact his answer is conclusive

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Wetherell avowed, that the evidence was offered with a view not to contradict the witness, but to criminate him.

The Court inquired whether he was prepared with a record of the witness's conviction.

Wetherell answered, that he was not; but contended that he had a right to prove such an accumulated infamy of character against the witness as would render him incredible. The point was insisted upon at considerable length by *Wetherell* and *Copley*, Serjt., who relied principally upon the following matters. That no decision could be cited by the Counsel for the Crown to the contrary; and that it would militate against the plainest principles of justice to reject such evidence, since a man might be able to prove that a witness was not to be believed upon his oath, by shewing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction. That since it might be proved indirectly, that the witness is not credible upon oath, it was too strong a proposition, to say that the same conclusion might not be proved, directly, by actual proof of accumulated crimes, which demonstrated the infamy of the witness; that the witness himself, were it not for the particular objection, that he is not bound to criminate himself, might be asked whether he had committed a particular crime; why then might not the same fact be proved by other evidence

evidence to which the particular objection did not apply. That the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out. A witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a court of justice; if he were to be asked the question, he would not be bound to answer it; and, therefore, if other evidence could not be adduced to prove it, that testimony, which is essential to the ascertainment of truth, inasmuch as it ascertains the degree of credit due to a witness, would be wholly excluded.

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The *Attorney-General* being about to reply, was stopped by the Court.

LORD ELLENBOROUGH. — This is so clear a point, and so entirely without precedent, that it would be a waste of time to call for a reply. For the purpose of ascertaining the credit due to witnesses, the Court indulge free cross-examination; but when a crime is imputed to a witness, of which he may be convicted by due course of law, the Court know but one medium of proof, the record of conviction. It is the constant practice at *Nisi Prius* not to receive such evidence without the record of conviction. You may ask the witness whether he has been guilty of such a crime, this, indeed, would be improperly asked, because he is not bound to criminate himself, but if he does

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answer promptly, you must be bound by the answer which he gives, for the Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself, by bringing forward evidence in answer to the charge, there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done.

BAYLEY, J. — I entertain no doubt upon this point, and this is not the first time I have had occasion to consider it. If this evidence were admissible, it would be impossible to proceed in the administration of justice, because on every trial the Court would have to try 100 different issues; and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. If a witness has been guilty of a crime which incapacitates him, you are to produce the record of his conviction and prove his identity, and then he cannot be heard in a court of justice. The rule is, that a party against whom a witness is called, may examine witnesses as to his general character; but he is not allowed to prove particular facts, in order to discredit him. The witnesses may state, that he is not a man to be believed upon his oath; but they cannot state, that at such a time he committed a particular offence, for although every man may be supposed to be capable

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capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice, and such evidence would, on that account, supply but a very imperfect test of credibility. If the witness were apprized of the charges, he might come prepared with evidence to shew, that although there was *prima facie* evidence against him, they were in reality unfounded. You may indeed ask the question of the witness himself; but if he choose to answer the question, you must stand or fall by the answer which he gives. He may demur to the question, for he is not bound to criminate himself; and if he refuse, this is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may. With regard to this particular case, I am of opinion that the Counsel for the prisoner cannot go into evidence of particular facts to shew that the witness is not to be believed upon his oath.

ABBOTT, J. — I am of the same opinion; and if the *Attorney-General* had not interfered the Court ought not to have admitted this evidence. In many cases counsel may not choose to object to particular evidence; but in no case ought the Court to admit evidence which by the law of the land ought not to be received. I was surprised

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to hear that the counsel for the prisoner did not expect that the admissibility of this evidence would be questioned. It has been much disputed of late years, whether it is competent to ask a witness whether he has committed any crime, or to put to him any question which tends to disgrace and disparage him. The subject is discussed much at length in the last edition of Mr. *Peake's* book on evidence; reference is there made to a *dictum* of Lord Chief J. *Treby*, who upon a trial for high treason said, that no question could be put to a witness, the answer to which might bring him into disgrace and disparagement. Within a few years upon a trial before the late Lord Chief Baron, than whom a more learned or humane judge never sat upon the bench, a question was put to the witness, I do not precisely recollect whether to criminate him, or whether it merely tended to discredit him: I believe the latter; but the Lord Chief Baron would not allow it to be put; and in order to bring the question to a conclusion, a bill of exceptions was tendered, in order that the point might be brought before the House of Lords; but it was not proceeded in. The usual question put for the purpose of discrediting the testimony of a witness is, Would you believe that witness upon his oath? but the particular reasons have never been received.

To what would the reception of such evidence lead? To the trial by the jury impannelled here

whether the witness had committed a crime: if so, since a similar inquiry might be made in the case of every other witness, the jury might be kept here from day to day to an indefinite period. This would be imposing a burthen which ought not to be cast upon them. There is no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other; and what is rejected in the one ought to be rejected in the other. But in civil causes how can the party or witness come prepared to rebut the presumptive evidence of guilt which may be adduced against him? On these grounds without going further into the subject, I am quite sure that this evidence ought not to be received.

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He afterwards added, that he recollected a case, *coram* LAWRENCE, J. at *Gloucester* (a), where a similar question was put to the witness, and the learned judge, after hesitating for some time, at last said, you may put the question if you please; but if you do, you must take the answer for good or for bad: you cannot call witnesses to contradict him.

HOLROYD, J.—I am also very clearly of the same opinion. If such evidence be admissible it

(a) *Harris v. Tippet*, 2 Camp. 637. and *Topping* said that the same point had been ruled by Mr. J. Lawrence, at York, in the *King v. Teale* and others.

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is to be expected that it would have been very frequently tendered and received; for it is obvious how very important such evidence must be in criminal cases particularly. The circumstance that such evidence never has been received is a strong argument to shew that it cannot be received; but this is not the first time that the question has occurred and such evidence has been rejected. In addition to the great inconvenience, it would be impossible truly and justly to decide collateral issues of this nature. How would it be possible for a party or a witness to come prepared to explain and rebut *prima facie* and presumptive proofs applicable to every action of his life, which notice of the charge might have enabled him to do? The effect would be to withdraw the attention of the jury from the question which they were impannelled to try, in order to try a number of collateral issues, and to render witnesses unwilling to appear in a court of justice, where they would be liable to charges, which for want of previous notice they could not repel. In the case of *Spenceley qui tam v. Willot (a)*, which was an action for usury, alleged to have been committed in a contract made by the defendant with the Marquis de Chambonas, after the Marquis de Chambonas had proved the usury as stated in the declaration, the defendant's counsel proposed to ask the Marquis what contracts he had made with a Mr.

(a) 7 East, 108.

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Schullenberg, and with several other third persons from whom he had taken up money on the same days, with a view to shew that the contracts in question were of the same nature, and not usurious, if he answered one way, or to contradict him if he answered otherwise. But Lord *Ellenborough* refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue, and held that it was not allowable to a counsel on cross-examination to put a question to a witness concerning any distinct collateral fact, not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses. And the plaintiff having obtained a verdict for 25,000*l.* the Court of K. B. rejected a motion for a new trial upon that ground, but granted a new trial upon another ground. Upon that occasion Lord *Ellenborough* observed, that he had ruled the point again and again at the sittings, till he was quite tired of the agitation of the question, and therefore wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might finally be put to rest. If the case came on for trial again there was an opportunity of tendering a bill of exceptions, by means of which the very eminent counsel (*a*), if he had thought the question tenable, might have carried it to the House of Lords. Some cases have occurred since: I have understood that the rule has been acted upon, to this extent at least, that

(*a*) Mr. Erskine.

if

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if you propose a question to a witness, and he declines to answer it, his not answering can have no effect with the jury. If he does answer it, you must be satisfied with his answer, since it is given upon the penalty of being prosecuted for perjury. This was so held by Mr. Justice *Lawrence*, in a case of which I have a note (b); and I have always considered it as settled law and acted upon from the earliest times.

An objection to a witness on the ground of misdescription must be taken in the first instance.

In the course of the evidence for the prisoner it appeared that the real name of a person who had been examined as a witness for the crown, and who had been described in the list of witnesses, delivered according to the statute as "*John Heyward, No. 6, Stangate-Wall, Lambeth*, was not *Heyward* but *Heywood*, and that he was not a *stock-broker*, as he was represented to be in the list. It was objected that on the ground of this misdescription his evidence ought now to be struck out.

But *per curiam*, the objection ought to have been taken in the first instance, otherwise a party might take the chance of getting evidence which he liked, and if he disliked the testimony, he might then get rid of it on the ground of misdescription, and if the witness himself had been asked as to his

(b) *Holroyd, J.* afterwards intimated that this was the same with *Harris v. Tippet*, 2 Camp. 637.

name,

name, he might have stated that he sometimes wrote his name one way and sometimes another ; and objections of a disqualifying nature ought to be taken in the first instance.

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The prisoner was acquitted.

The *Attorney-General*, *Topping*, *Gurney*, and *H. Shepherd*, for the Crown.

Wetherell and *Copley*, Serjt. for the prisoner.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings after Trinity Term,
57 GEORGE III.

=====

GUILDHALL.

=====

HOLLAND v. PALSER.

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THIS was an action of assumpsit, brought to recover a quarter's rent for a house.

The house, by the terms of agreement was let for twelve calendar months, at the yearly rent of 80*l.*, the rent to commence at *Michaelmas*, and to be paid three months in advance, such advance of 20*l.* to be paid on taking possession. Two quarters rent had been paid, and the third quarter had not expired when the action was brought; the only question was, whether under the terms of this agreement, the rent for the third quarter had accrued at the commencement of the quarter before the action was brought.

Agreement to let a house for a year, the rent to commence at *Michaelmas*, and to be paid three months in advance, such advance to be paid by taking possession. *Semble*, this stipulation relates to the first quarter's rent only.

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It was contended for the plaintiff, that if there was any ambiguity in the terms, it might be explained by parol evidence, but —

Lord ELLENBOROUGH held, that the question turned entirely upon the construction of the agreement, if it had been intended that each succeeding quarter's rent should be paid in advance, it would have been very easy to have said, "always paid in advance;" his Lordship added, that he was willing to save the point; but that his present impression was, that the stipulation for the advance, under the terms of the agreement, related to the first quarter's rent only. (a)

Marryatt and Norton for the plaintiff.

Scarlett for the defendant.

(a) The point was not moved.

Same day.

WALLACE v. JARMAN.

The purchaser of a warranted but worthless watch, is entitled to maintain an action for deceit, although it is stipulated, that if he dislikes the watch, the vendor shall exchange it for one of equal value.


THIS was an action upon the case, for deceit in the sale of a watch, sold by the defendant to the plaintiff.

The seventh count of the declaration was for a malicious charge of felony before a magistrate, and there was also a count for slander.

The defendant was a watchmaker, and it ap-

peared

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 vs
 JARMAN.

peared that the plaintiff had bought a watch at his shop for the sum of four guineas and a half, warranted to go well. Before the purchase a card was shewn to the plaintiff, intimating, that if the watch was not liked it should be exchanged for another of the same value. The watch would not go, and the plaintiff brought it back to the defendant, and several other watches were shewn to the plaintiff which he did not approve of, and he fixed upon a watch, for which twelve guineas was asked, which he insisted upon keeping, unless his money should be returned; and he was retiring from the shop with the latter watch in his possession, when the defendant called a constable and took him before a magistrate upon a charge of felony; the watch was then given up, and the complaint was dismissed.

It was now objected, that the action could not be maintained upon the warranty, since there was an agreement to take another watch in exchange, if the purchaser disliked that which he had bought; but —

LORD ELLENBOROUGH was of opinion that this agreement was collateral to the warranty; and that the plaintiff was not bound to take another watch in exchange; he might go on to the end of the chapter, if he were obliged to take bad for bad. The parties had been guilty of mutual torts, and the taking away the second watch might amount to a conversion,

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version, but it was taken under a claim, and could not be elevated into a felony.

Marryatt for the defendant contended, that the fact of a stranger attempting to carry away a watch under the circumstances, and refusing to give his name, afforded probable cause for a charge of felony, but —

Lord ELLENBOROUGH held that the charge of felony was not justifiable, although the circumstances might operate in mitigation of damages. Ultimately the plaintiff had a verdict for the price of the watch.

Scarlett for the plaintiff.

Marryatt for the defendant.

POWELL v. FORD.

The acceptance of a bill of exchange, purports to bear the signature of the acceptor's christian name, as well as surname, proof of the latter, by a witness who never saw the acceptor write his christian name and had seen him write his surname once only, is not sufficient.

THIS was an action by the payee against the acceptor of a bill of exchange.

A witness called to prove the hand-writing of the defendant upon the bill of exchange, upon which both the christian and surname were written by the acceptor, stated, that he had seen the defendant write once before, when he executed a bail bond, and that he had since compared the hand-

writing

writing upon the bill, with that upon the bail bond, and believed the former to have been also written by the defendant ; he also stated, that from having seen the defendant execute the bail bond, he believed that the acceptance was in his hand-writing ; but that when the defendant signed the bail bond, he did not write his name at length, but only “ *M. Ford.*”

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v.

FORD

LORD ELLENBOROUGH said, that if the witness had seen the defendant write his name at full length, although but once, it might have been sufficient, if, from the exemplar lodged in his mind, he could have sworn to a belief that the hand-writing was the same ; but that the evidence given was insufficient, since the witness had never seen the defendant write his christian name, and that it was as necessary to prove the christian name as well as the surname, to be in the defendant's hand-writing, and that the one was not to be inferred from the other, any more than the rest of the name itself could be inferred, from proof that one or two letters were in his hand-writing.

Plaintiff nonsuited.

Gurney and David Pollock, for the plaintiff.

Topping for the defendant.

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DARNELL v. WILLIAMS.

Same day.

An acceptor of a bill of exchange, on an action brought against him by the payee, may shew that he accepted it for value as to part, and as an accommodation bill as to the rest.

THIS was an action by the payee, against the acceptor of a bill of exchange, for 19l. 5s.

The plaintiff having proved a *prima facie* case, and shewn, that the defendant, after the bill became due, paid 10l. upon it, and took the bill away with him; it was proved on the part of the defendant, that when the bill was tendered to the defendant for his acceptance, he said that he had agreed to accept a bill to the amount of 10l. only, but that, upon the plaintiff's urging him to do it as a matter of accommodation to the plaintiff, he had accepted the bill in question. The sum of ten pounds had been paid into court.

LORD ELLENBOROUGH held, that although with respect to third persons, the amount of the bill might be 19l. 5s. yet, as between these parties, it was an acceptance to the amount of 10l. only, and

The plaintiff was nonsuited.

Scarlett and Bolland for the plaintiff.

Merewether for the defendant.

See *Wiffen v. Roberts*, 1 Esp. R. 261. But where a promissory note is given for the stipulated amount of goods sold, the maker cannot dispute the amount. *Solomon v. Turner*, supra, vol 1. 51.

WOOD v. WADE.

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THIS was an action on a bond, conditioned to indemnify the plaintiff against a bond by which he was bound to one *Barthrop*, if the money were not paid to the latter by the defendant before such a day.

The plaintiff proved his case, and the only question was, as to the amount of damages, since it did not appear that the plaintiff had been actually compelled to pay the money.

Lord ELLENBOROUGH said, that he did not see any measure of damages, except the penalty of the bond, and the jury gave a verdict accordingly.

A. binds himself under a penalty to indemnify B. against his obligation to C., if the money be not paid before a certain day. B., in an action on the bond, for not indemnifying, is entitled to recover the amount of the penalty of the bond.

Nolan for the plaintiff.

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER.

ISAACS v. BRAND and Others.

Saturday,
June 28.

THIS was an action of trespass and false imprisonment.

apprehending and imprisoning a person, on suspicion of having received stolen goods, on the mere assertion of one of the principal felons.

Semble. A constable is not justified in

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and Others.

It appeared in the course of the evidence, that upon a *Saturday* evening, a felony had been committed in the house of a silk weaver in *Spital Fields*, by cutting away and stealing a quantity of silk from the loom. And that upon the day following, three boys, *Ellison*, *Devine*, and *George* had been apprehended, (upon suspicion of their having committed this felony,) by the defendant *Brand*, who was a marshalman of the City of *London*; and that upon being taken up, one of the boys confessed his guilt; and stated, that he had taken the silk to the house of the plaintiff *Isaacs*, to whom he had disposed of it. Upon the same day, *Brand* went along with *George* to the plaintiff's house, and charged him with having bought some silk on the preceding evening from some boys who had stolen it. The plaintiff denied it, but afterwards said, that he had some silk, but that he did not buy it; *Brand* afterwards went again to the house of the plaintiff on the same day with assistance, and without the authority of any warrant, took him into custody, upon a charge of receiving the silk, knowing it to have been stolen. On the next day, the plaintiff and the boys were taken before the Lord Mayor, and it did not appear that any charge was then made against the plaintiff, and he was discharged.

On the part of the defendants, it was contended, that they were justified in apprehending the plaintiff, and taking him before the Lord Mayor, since a felony had been committed, and a charge of felony

6

had

had been made against the plaintiff; and it was contended, that the constable as a ministerial and not a judicial officer, was bound to act upon the information, and to take the plaintiff into custody. And the case of *Ledwith v. Catchpole*, *Cald.* 291, was referred to, and the opinions of Lord *Mansfield*, and Mr. *J. Buller*, as stated in that case, were cited; but —

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 and Others.

LORD ELLENBOROUGH was of opinion, that the declaration of such an accomplice did not justify the officer in taking the plaintiff into custody upon a charge of receiving the stolen goods without any warrant, and without any evidence, except the assertion of the boy, to shew that he had bought the goods at an inferior price, or with any knowledge of their having been stolen. And his lordship, afterwards, left it to the jury to decide, whether, since no charge was made against the plaintiff on the following day, there was any probable ground for apprehending the plaintiff, and keeping him all night in the watch-house.

The jury found a verdict for the plaintiff.
 Damages 5*l.*

Gurney and *F. Pollock*, for the plaintiff.

Scarlett, *Bolland*, and *Adolphus*, for the defendants.

1817.

Tuesday,
July 1.

DEVON and Another v. FRICKER.

Although it is usual for the solicitor of the vendor of an estate, sold at a master's office, to procure the confirmation of the sale in the Court of Chancery, to the expence of which, the vendee is liable; the vendee may if he choose, employ his own solicitor to transact the business.

THIS was an action of assumpsit, for business done by the plaintiffs, as attorneys for the defendant.

It appeared, that the estate of a person of the name of *Brodie*, had been sold under the direction of the Court of *Chancery* at the master's office, and that the defendant, upon that occasion, bade the sum of 1700*l.* for it, and was declared to be the purchaser. It also appeared, that in order to complete the title of the purchaser, it is necessary in such cases, to have the master's report confirmed by the Court, and that a rule *nisi* and a rule absolute are necessary for that purpose. The action was brought by the plaintiffs, who were the solicitors for the vendor, to recover the sum of 13*l.* 13*s.*, as their charges for transacting this business; and it was proposed on their part, to prove that the expences of such confirmation of the master's report were borne by the purchaser, and that it was the custom for the vendor's solicitor to procure these formal acts to be done. This species of evidence was opposed, on the part of the defendant.

ABBOTT, J., was of opinion, that such a custom could not be binding on the purchaser, who
cer-

certainly was at liberty to employ his own solicitor, but in this case, he had not done so.

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and Another
v.
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It afterwards appeared, that after the sale, the defendant had said, that he was the purchaser, and was willing to sell the estate again for the same sum; and that he afterwards said, that *Cooper* was jointly concerned with him in the purchase. The conveyance was afterwards made to *Cooper*, and recited, that *Fricker* had purchased the estate for *Cooper*; this was after the confirmation of the master's report. It did not appear that the defendant had personally authorized the plaintiffs to transact this business.

Gurney for the defendant, submitted that the plaintiffs must be called, since, if they had been employed by any one, they must be considered as having been employed by *Cooper*, the real purchaser; but —

ABBOTT, J., was of opinion, that it was a question for the jury, and in summing up to them, his Lordship observed, that it was admitted, that some one was liable, the only question was, not whether the plaintiffs might not have maintained an action against *Cooper*, but whether it was not competent to them to maintain an action against the present defendant; since he might be liable, although *Cooper* might also be liable. That the case was of a peculiar nature, since there had been no personal employment or retainer of the plaintiffs.
That

1817. That the business had been done in the months of
June and July, at a time when it was not known
 that *Cooper* had any thing to do with the purchase.
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 and Another
 v.
 FRICKER.

Verdict for the plaintiffs.

Richardson and Burrell, for the plaintiffs.

Gurney for the defendant.

TERRY v. BARKER.

A., a maltster, sends malt to B. the purchaser, which is conveyed in C.'s barge, and is delivered to B. in sacks belonging to C., B. requests that the sacks may be left for his own convenience, and engages to return them within a reasonable time. The contract to return the sacks is between B. and C.

THIS was an action of special assumpsit, for not delivering a number of sacks to the plaintiff within a reasonable time.

The defendant, a brewer, had purchased a quantity of malt from *Gower*, a maltster, and *Gower* had employed the plaintiff, a bargeman, to convey the malt in his barge, and to deliver it to the defendant. The malt had been conveyed in sacks belonging to the plaintiff, and when the malt was delivered, it being inconvenient that the whole should be then discharged from the sacks, the plaintiff was requested to leave the sacks, upon an undertaking that they should be returned within a reasonable time.

On the part of the defendant it was contended, that the action could not be maintained by the present plaintiff, since there was no privity of
 of

of contract between himself and the defendant, for the latter knew no one in the transaction except *Gower*, the vendor of the malt, whose duty it was to provide proper packages for the malt, and that he was not bound to take an account of the sacks belonging to each individual bargeman, He dealt with *Gower*, and had nothing to do with the means of conveyance; and that it was the business of the vendor to find the proper means of conveyance; the brewer had nothing to do but to receive the goods. It was proved that it was the usual course to order malt from the maltster, to be delivered in sacks, and that they were generally carted from the wharf at the expence of the vendor, and that the sacks were usually left, and delivered to the lighterman the next time he came. It appeared also, that the malt in this case had been sent to the barge loose, unpacked in any sacks.

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LORD ELLENBOROUGH was of opinion, that there was a sufficient privity of contract between the parties to support the action, since the defendant, in undertaking to return the sacks, undertook to return them to the person whose property they were. His lordship, however, left it as a question for the jury to consider with whom the contract was made for returning the sacks, and the jury found a verdict for the plaintiff.

Lawes and ——— for the plaintiff.

Marryatt and *Comyn* for the defendant.

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· GROVE and Another v. WARE.

A., as surety for B. binds himself to pay to C. the balance of account between B. and C. within the space of six months after notice. In an action by C. against A, parol evidence of such notice cannot be given without proof of the usual notice to produce it.

THIS was an action brought by the plaintiffs, who were bankers, to recover from the defendant, as the surety for a person of the name of *Spriggens*, in an indemnity bond, the sum of 4000*l.* upon the balance of an account between the plaintiffs and *Spriggens*. The bond was conditioned to pay what was due from *Spriggens* to the plaintiffs, or what might become due to them within the space of six months after notice.

It was contended, on the part of the plaintiffs, that it was not necessary to prove a notice to the defendant, to produce the notice given to her, such as was required by the condition of the bond, since a notice to produce a notice is in general unnecessary ; but —

LORD ELLENBOROUGH was of opinion, that proof of the notice to produce was necessary, since the notice to pay was not properly a mere notice, but a statement of the account between the plaintiffs and the principal.

The notice was afterwards proved, and the plaintiffs had a verdict.

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Lord SUFFIELD v. BRUCE.

Thursday,
July 3.

THIS was an action on a special assumpsit, to indemnify the plaintiff against a demand by *G. Scott* given under the following circumstances.

Lord *Suffield*, as the colonel of the *East Norfolk Militia*, had been accustomed to deal with *Hugh Evans Scott*, and *George Scott*, who were partners, the one residing in *England* and the other in *Ireland*, for cloth for the use of the regiment. *Hugh Evans Scott* died, and *George Scott* entered into partnership with *Bruce*, the present defendant, and *Brown*, with whom the plaintiff also dealt. The firm of *Brown, Bruce, and Scott*, claimed a balance from the plaintiff, of 449*l.* 19*s.* 1*d.*; which he paid by the hands of *Weaver*, his agent, and received from the defendant, a letter to indemnify him for so doing, (on which the present action was founded,) a doubt having arisen, whether some part of the debt was not due to *G. Scott*, as the surviving partner of his brother. The defendant in this letter, which was dated *November 11th, 1815*, admitted the receipt of 449*l.* 19*s.* 1*d.* by the hands of *Weaver*, and added, “most certainly, I will indemnify your lordship, and hold you harmless from the payment; but I beg you
“ will

A. having paid to B. the whole of a demand claimed by B., but part of which is due to C. B. afterwards engages to indemnify A. against any claim by C., this promise is supported by a sufficient consideration, although it was made after the payment of the money.

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Lord
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“ will not let my engagement to that effect transpire.” After this, an action had been brought by *G. Scott*, as the surviving partner of his brother, against Lord *Suffield*, which was referred ; and upon the reference, it had been found, that 90% was due to the plaintiff in that action.

On the production of the record, in the case of *Scott v. Lord Suffield*, it appeared, that the defendant was styled Baron *Suffield* ; but in alleging the recovery in that action on the present record, he was described as the Right Honourable the Earl of *Suffield*.

Comyn for the defendant objected, that this was a fatal variance ; but —

Lord ELLENBOROUGH over-ruled the objection, upon its being answered on the part of the plaintiff, that it would be proved, that they were the same person.

Comyn afterwards objected, that the payment of the money to the defendant, was anterior to the undertaking contained in his letter ; and therefore that there was no consideration for the indemnity, and consequently that the promise was a mere *nudum factum* ; but —

Lord ELLENBOROUGH was of opinion, that the receipt of the whole of the money which was admitted

mitted in the defendant's letter supplied a sufficient moral consideration to support the promise.

Verdict for the plaintiff.

Scarlett and Puller for the plaintiff.

Comyn for the defendant.

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BRUCE.

HORNBUCKLE v. HORN BURY.

THIS was an action against the defendant, for goods sold and delivered to his wife, from whom he was separated.

The plaintiff, gave in evidence, a letter written by the defendant, in which he stated, that he had received the plaintiff's bill, and that he would discharge it as soon as he could make arrangements for so doing.

On the part of the defendant, it was stated, that when the separation took place between the defendant and his wife, an annuity was settled upon her by him, on an understanding that no claim should be made upon him for further supplies, and that this was known to the plaintiff, but that the defendant, on finding the bills, sent to him, conceiving himself to be liable to pay them, had unwarily written the above letter; but —

A husband who allows his wife a separate maintenance, promises to pay the amount of a debt which she contracts in a state of separation; he cannot afterwards recede from his promise, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he made the promise under a misapprehension of Law.

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HORN-
BUCKLE

v.

HORNBURY.

Lord ELLENBOROUGH was of opinion, that no effectual defence could be made, since a promise made under a mistake of law was not avoidable, and the fact of the defendant's having made the promise after seeing the bills, was very strong evidence, to shew that the maintenance allowed to the wife, was not an adequate one.

Verdict for the plaintiff.

Gurney and Chitty for the plaintiff.

Scarlett for the defendant.

BEDFORD v. DEAKIN and Two Others.

The plaintiff holding a bill of exchange as a security from three partners, after the dissolution of the copartnership, and after the bankruptcy of one of them, takes the notes of one of them as a collateral security, without the knowledge of the other partners, and retains the original security in his hands. This does not discharge the other partners.

THIS was an action against *Deakin, Bickley,* and *Hickman*, as the drawers of a bill of exchange.

At the time when the bill in question was drawn, the three defendants were copartners. Afterwards, in *February*, 1814, the partnership was dissolved, and in the month of *November*, in the same year, *Hickman* became bankrupt.

Bickley, wishing an arrangement to be made, as to the securities which the plaintiff held from the three defendants, proposed to give his own notes as a security, payable at the respective periods of

four,

four, eight, and twelve months: The plaintiff agreed to accept of these securities, reserving to himself the security which he held from the three defendants, and the notes were accordingly drawn by *Bickley*, and a surety of the name of *Rushbury*, for the original sum, and interest calculated up to the times of payment. The plaintiff still retained in his possession the original bill. The notes were unproductive.

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Topping, for the defendant *Deakin*, contended, that this negotiation between the plaintiff and *Bickley*, after the dissolution of partnership, and after the bankruptcy of one of the partners, and the agreement of the plaintiff to take the separate security of *Bickley*, operated to discharge the three from their original liability; and he cited the cases of *Evans v. Drummond* (a), and *Reed v. White*.(b) That the transaction amounted to an agreement, without the knowledge of *Deakin*, to postpone the time of payment, since interest was calculated on the original debt, up to the time when *Bickley's* notes would become due.

LORD ELLENBOROUGH. — I do not see that the plaintiff's taking the notes as a collateral security, alters the original liability of the defendants. In the case of *Evans v. Drummond*, the separate note of the partner was taken as a substitute, and in exchange for the security, which had been given

(a) 4 Esp. 89.

(b) 5 Esp. 122.

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and Others.

by the partners ; but here the notes were taken as a mere collateral security. If there had been any agreement here to postpone the payment of the original debt without the consent of *Deakin*, I should have assented to the objection, but there was no such agreement. The only question is, whether there was any dealing which could prejudice the other partners. If the plaintiff had agreed to postpone his remedy against the other partners, I should have acceded to the objection ; it would have been an immediate consequence of such an agreement ; but the plaintiff took the notes on the express condition, that they should not affect the security which he already held, and he might have proceeded instantly to enforce that security. I accede to the cases which have been cited, but this differs from them in this material circumstance, that the original security was never delivered up.

Verdict for the plaintiff.

Jervis and *Campbell* for the plaintiff.

Topping and *Gaselee* for the defendant.

HIGGS v. DIXON.

When a warrant to distrain has been signed by an attesting witness, that witness must be called to prove it.

THIS was an action of trespass.

On producing a warrant to distrain, which was in the hand-writing of the defendant, it ap-

peared

peared that it had been signed by an attesting witness.

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v.

DIXON.

On its being objected, that it ought to be proved by calling the attesting witness —

Scarlett contended, that the case was not like that of a bond or bill of exchange, where it is necessary to prove the instrument by means of the attesting witness ; but —

LORD ELLENBOROUGH was of opinion, that there was no ground for departing from the ordinary rule.

OLIVE v. EAMES.

THIS was an action against the defendant a carrier for the loss of a parcel.

Soon after the loss had happened, a friend of the plaintiff's went to the office where the parcel had been delivered, to make enquiry after it, and saw there the book-keeper to whom the parcel had been delivered.

The counsel for the plaintiff was examining as to a conversation which took place upon that occasion, when the book-keeper made an offer to pay 5*l.* for the parcel.

This was objected to on the part of the defendant.

A promise made by the book-keeper of a carrier at the office to make compensation for the loss of a parcel is not binding upon the carrier, unless the book-keeper be shewn to be his general agent.

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Lord ELLENBOROUGH. — The book-keeper is employed by his principal merely as an historian, and what he says is not evidence for the purpose of binding his principal, unless you prove that he is employed as a general agent, and that the principal ratifies the promises which he makes.

The plaintiff afterwards obtained a verdict.

Scarlett and ——— for the plaintiff.

Gurney and *Chitty* for the defendant.

GILMAN v. COUSINS and Three Others.

In an action against the assignees of a bankrupt and their servants, the proceedings may be read in evidence, where no notice has been given under the statute, of the plaintiff's intention to dispute the bankruptcy, although there are other defendants on the record besides the assignees.

THIS was an action of trespass, for breaking and entering the plaintiff's house, and taking his goods, &c.

The defence was, that two of the defendants were assignees under a commission of bankrupt against *Gilman*, and that the others had acted as their servants in taking possession of the house which had been in possession of the plaintiff as agent of the assignees.

No notice having been given according to Sir *Samuel Romilly's* act, of the plaintiff's intention to dispute the bankruptcy, &c. the defendants proposed to read the proceedings under the commission.

It

It was objected, that the case was not within the statute as to notice, since there were other defendants besides the assignees upon the record ; but —

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COUSINS
and Others.

BAYLEY, J., was of opinion, that since the other defendants justified as the servants of the assignees, the case was within the statute, and the proceedings were read.

COOKE v. MAXWELL.

THIS was an action of trespass and false imprisonment.

The plaintiff, who was an American subject, in the year 1813, being employed in the *African* trade, purchased a factory on the *Rio Pongus*, in *Africa*. The defendant was the governor of the *British* colony, *Sierra Leone*, and the action was brought against him for having unlawfully arrested the plaintiff at his factory on the *Rio Pongus*, which was about ninety miles distant from *Sierra Leone*, within the district of *Mungo Cattie*, and beyond the limits of the colony, and for having carried away stores from the factory to a very large amount, and destroyed the remainder.

The defence which was attempted, was, that the plaintiff had been concerned in carrying on an illegal traffic in slaves ; for which offence, he had been tried and convicted in the court at *Sierra Leone*, and sentenced to transportation.

A record of a conviction of felony, without a caption, is not admissible in evidence to incapacitate a witness.

When the directions which have been given by a defendant to his agent cannot be read on the ground of public policy, the agent may be asked whether he did not act under the direction of the defendant.

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A witness of the name of *Brodie* having been called on the part of the plaintiff, —

The *Attorney-General* for the defendant, objected to his competency, on the ground that he had been convicted of trading in slaves before the court of *Sierra Leone*, and an instrument was produced which purported to be an indictment against *Brodie* for that offence, on which he had been convicted, and that this indictment had been found by *B. Macdonald*, and his fellows upon oath.

It was objected on the part of the plaintiff, that this was not sufficient to incapacitate the witness, since there was no caption of the indictment; consequently, it did not appear that it had been found by any persons, or in any court of sufficient authority, neither did it appear that the party was a *British* subject, or that the offence was committed within the territories of *Great Britain*.

The *Attorney-General* in answer, contended, that so long as the conviction stood unreversed, it was to be considered as sufficient, although there might be defects in it, on account of which it might be reversed by writ of error; but that the Court here could not notice these objections, since it would, in effect, be deciding as a Court of error.

BAYLEY, J. — It purports to be an indictment and conviction; but it does not shew by what authority

ity the indictment was found ; it is imperfect as a record, without the caption, since it does not appear to have been found by any persons who were competent to find an indictment ; besides it does not allege that the party was a *British* subject, or resident within the *British* territory ; and if it does not state that which is essential to the offence, the mere statement that a fact amounts to a felony will not render it a felony.

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Major *Appleton*, who had immediately caused the arrest of the plaintiff, and who had given the immediate orders for the destruction of the factory, having been called as a witness for the plaintiff, in order to prove that he had acted under the authority and direction of the defendant, stated that his orders were in writing, and demurred to the production of them on the ground, that it would be attended with inconvenience to the public, that such orders should be divulged. Upon this objection being made, the witness was asked generally, whether he had done any thing which had not been warranted by the instructions which he had received from the defendant.

The *Attorney-General* contended, that the instructions themselves could not be read in evidence, for reasons of public policy ; and referred to a case, in which he said, that Lord *Ellenborough* had ruled, that a letter from a secretary of state, to a person acting under his authority could

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could not be read in evidence. And that supposing the document, on principles of public policy, to be excluded, no parol evidence could be received of any part, since this would be prejudicial to the party to be affected by it, since part would be revealed, and that which tended to give an explanation of it in favour of the party, might be excluded. The written instructions to Major *Appleton*, could not, in point of law, be produced; and if parol evidence were to be admitted, the usual rule of evidence would be reversed in the admission of parol evidence, to affect the defendant, whilst he was deprived of the opportunity of explanation.

BAYLEY, J. — The law will not work injustice, and if the document cannot, on principles of public policy be read in evidence, the effect will be the same as if it was not in existence; and you may prove, not the contents of the instrument; but that what was done was done by the order of the defendant.

Major *Appleton* afterwards stated, that he acted under the direction of the defendant; and that he had left orders for the destruction of the factory; and that the stores which were not taken away should be burnt.

The plaintiff afterwards called a witness to prove that he had previously apprized the defendant that the

the steps which he was taking against the plaintiff were illegal ; but —

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BAYLEY, J., was of opinion, that in an action of trespass, this could make no difference as to the damages, since the question was not whether the defendant had acted advisedly, but whether he had acted illegally.

Verdict for the plaintiff, subject to a reference as to the amount of the damages.

Scarlett, Marryatt, Gurney, and Wilton for the plaintiff.

Shepherd, A. G., Topping and Richardson for the defendant.

DOE on the Demise of CUFF v. STRADLING.

THIS was an action of ejectment, brought to recover several rooms and a yard at *White-chapel*.

The plaintiff is entitled to recover in ejectment, although it appears that the defendant, who is in possession, is the mere servant of another by whose permission he entered into possession.

It appeared, that the lessor of the plaintiff had let the premises in question for one year to a person of the name of *Fish* ; and that the defendant had entered upon the premises as the servant of *Fish*, and, by permission of *Fish*, had since continued in possession of them after the expiration of the year.

Chitty for the defendant contended, that since the defendant was merely the servant of *Fish*, the action could not be maintained, *Fish* being still in possession ; but —

BAYLEY,

1817.

**Dea Dem.
Cuff**

**v.
STRADLING.**

BAYLEY, J., held that the plaintiff was entitled to recover, since the defendant was in possession, and was a mere trespasser.

Verdict accordingly.

Marryatt for the plaintiff.

Chitty for the defendant.

The CHURCHWARDENS and OVERSEERS of the PARISH
of ST. MARTIN v. WARREN.

A defendant's liability as surety in a bastardy bond, is not discharged by his bankruptcy and certificate.

THIS was an action brought by the churchwardens and overseers of the parish of *St. Martin*, against the defendant, as surety in a bastardy bond, to recover the amount of the expence of supporting the bastard child of one *Lawrence*. One of the pleas was the bankruptcy of the defendant, and the question was, whether the action was barred by the bankruptcy of the defendant, and his subsequent certificate.

BAYLEY, J., was of opinion, that the action was not barred, but saved the point for the opinion of the Court.

Verdict for the plaintiffs.

Scarlett and *Taddy* for the plaintiffs.

Gurney and *Chitty* for the defendant.

The

The Court of *King's Bench* in the next *Easter* Term, gave judgment for the plaintiffs.

1817.

Parish of
ST. MARTIN
v.
WARREN.

ADEY v. BRIDGES and Another.

THIS was an action against the sheriff of *Mid-
dlessex*. The declaration contained three counts; the first, was for suffering *John Humfrey*, who had been arrested at the suit of the plaintiff upon mesne process, indorsed for 200*l.* to escape. The second count was, for not arresting the defendant when they might; and the third, was for not taking a bail bond.

The writ was produced returnable in one month of *Easter*.

Topping for the defendant, contended, that he was entitled to have the sheriff's return read in evidence, as well as the writ itself; since part of a document could not be read without reading the whole.

Scarlett for the plaintiff, contended, that the general principle did not apply to the present case. The ground of the rule which required the whole of a document to be read, was this, that the sense of one part might be materially altered by another part; but here, that principle did not apply, since the writ was perfectly distinct

In an action against the sheriff for an escape on mesne process, a copy of the writ is given in evidence by the plaintiff, and the document contains also a copy of the sheriff's return. The defendant is not entitled to have the copy of the return read as part of the document.

— In such an action, the sheriff's return of a rescue is not conclusive.

1817.

ANDY

v.

BRIDGES

and Another.

from the return. Where an answer in Chancery is produced, not as *inter partes*, but by way of confession, the bill must be read, in order to elucidate the meaning of the answer, but the replication need not be read. If in this case, the original writ had been produced, the sheriff could not have read his indorsement upon it, and the giving a copy in evidence, would not make that evidence, which would not have been evidence, had the original been produced.

Topping, replied, that it could not appear until the return was read, what light it would throw upon the subject; but contended, that the whole of the document, as produced, must be read, although the plaintiff might have produced a copy of part only.

HOLROYD, J., was of opinion, that the defendant was not entitled to have the return read as part of the document produced by the plaintiff.

On the part of the defendant, it was proposed to prove, that the sheriff had returned that the party had been rescued, and it was contended, that this return was binding in the present action, since the return of the sheriff becomes a record of the Court, which is not traversable, and if the return had been false, an action might have been brought for the false return. On the other hand,

it was contended, that the return made by the sheriff could not be evidence for himself.

1817.

ADEY

v.

BRIDGES
and Another.

HOLROYD, J., was of opinion, that the return was admissible in evidence, but that it could not be conclusive in the present action; although in another action it would be so.

The sheriff's return of a rescue was accordingly read.

The plaintiff afterwards had a verdict, damages 20l.

Scarlett, Marryatt, and Espinasse for the plaintiff.
Topping and Holt for the defendant.

TRELAWNEY v. COLMAN.

THIS was an action for criminal conversation with the plaintiff's wife.

In an action for criminal conversation,

proof that a letter produced

It appeared that the wife of the plaintiff, who corresponds, as to its contents, with a letter which the wife wrote to her husband, whilst she was absent from him, (before the criminal intercourse,) upon a visit at the house of a friend, and which she read over to the witness, is sufficeint to warrant the reception of the letter in evidence, although no explanation is given of the cause of their living apart, there being no ground to suspect collusion. — The judgment which a witness forms from the conduct and expressions of the wife to her husband whilst she lives apart from him, as to her affection for him is evidence.

was

1817.

TRELAWNEY

v.

COLMAN.

was a midshipman in the navy, during a temporary absence from her husband, was upon a visit at the house of a friend at *Hinckley*, in *Leicestershire*.

A witness who became acquainted with her, during her stay there, was examined as to the judgment which she had formed during that acquaintance of Mrs. *Trelawney*'s affection for her husband; and, upon an objection being taken to this evidence,

HOLROYD, J., was of opinion, that the judgment which the witness had formed, from the anxiety which the wife had expressed concerning her husband, and from her mode of speaking of him during her absence from him was evidence.

The same witness stated, that Mrs. *Trelawney* usually wrote to her husband once or twice a week, and that she frequently read such letters to the witness; and a letter purporting to have been written by Mrs. *Trelawney* to her husband, and bearing the *Hinckley* post-mark, was produced, and the witness, on reading this letter, stated, that the contents brought to her recollection the contents of a letter which Mrs. *Trelawney* had read to her, but which she had not read herself. It was then proposed to read this letter in evidence.

Gurney for the defendant objected to this evidence. In *Edwards v. Crooke (a)*, it had

(a) 4 Esp. 39.

been

been held by Lord *Kenyon*, that a letter written by the wife to the husband, could not be read in an action for criminal conversation, without strict proof that it was written at a time when there was no suspicion of misconduct; it was necessary to prove, that the letter had existence at the time of the date. Here the only evidence is, that the lady wrote letters, and recited something which she had written; but this is all consistent with the supposition, that the letter was written the very last week. Such evidence is to be watched with jealousy, and it is necessary that the witness should herself have read the letter; the taking the contents from another is not sufficient, because the witness had no means of judging whether the letter was truly recited, and whether the whole of the contents were the same.

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 TRELAWNEY
 v.
 COLMAN.

HOLROYD, J. — The intent of reading the letter in evidence is, to shew what was the state of the wife's mind and affections at the time when the letter was written. The letter alone, without further proof, is not sufficient, because it might have been fabricated since, and some evidence is necessary to shew that it was not subsequently written. The witness here states, that she sate by her whilst she wrote the letter, and that the contents of the letter produced correspond with that which was read to her. This I think is sufficient to warrant the reception of this letter in evidence.

1817.
 TRELAWNEY
 v.
 COLMAN.

The plaintiff afterwards obtained a verdict, damages 500*l*.

Scarlett and *Pollock* for the plaintiff.

Gurney and *Jessop* for the defendant.

In the ensuing term, *Gurney* moved for a rule *nisi* for a new trial; and insisted that the letters ought not to have been received without some explanation of the reason why the plaintiff and his wife were living apart at the time when the letter was written; but —

The Court refused the rule.

IN THE KING'S BENCH.

Sittings after Trinity Term.

GUILDHALL.

ROBINSON v. WILLIS.

Friday,
 July 11.

Slander —
 Variance.

THIS was an action for slander.

The words laid in the declaration were, “ You
 “ are a thief; you stole one of my sheep, and
 “ killed it, I found the skin in your yard.”

The words, as proved in evidence, were, “ You
 “ stole my sheep and killed it.”

Scarlett

Scarlett objected, that there was a material variance between the expressions, my sheep, and *one* of my sheep ; but —

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ROBINSON

v.

WILLIS.

LORD ELLENBOROUGH over-ruled the objection, observing, that the words you killed it, shewed, that one sheep only was meant.

Verdict for the plaintiff, damages 5*l*.

Marryatt and *Espinasse* for the plaintiffs.

Scarlett for the defendant.

HARRY v. WALL.

Saturday,
July 12.

THIS was an action by the plaintiff, the payee, against the maker of a promissory note, dated *October* 12th, 1816, at two months after date.

A a creditor of B executes a composition deed, without specifying the amount of his demand, he thereby binds himself to the extent of his claim, although the terms of the deed are, to take the composition for the sums set opposite to the respective names of the creditors who execute the deed.

It appeared, that after the note was given, and before it became due, a composition deed, dated 20th *October*, 1816, had been executed between the defendant and some of her creditors, by which the latter had agreed to take 3*s*. 6*d*. in the pound in satisfaction of the respective debts set opposite to their names, and by which she conveyed her property to two trustees, who were also parties to the deed for the benefit of her creditors. This had been executed by the plaintiff, who when he signed the deed, said that he would not specify the amount of his debt; the amount was not specified upon the deed. When the plaintiff was called upon

1817.

HARRY
v.
WALL.

afterwards to specify his debt, he said, that he expected the note to be paid. The deed contained a covenant on the part of the creditors, that if the defendant should on or before the 17th of *January*, pay or cause to be paid the said composition of 3s. 6d. in the pound; then they would execute releases in bar of all demands, and they further covenanted, that they would not within the time granted for payment, attach or molest the said defendant. At the time when the plaintiff signed the deed, the note had been indorsed by him, and paid by him to *Buckle and Co.*, bankers, at *Newport*, on his account, and credit had been given to him for the amount. The note was in the hands of *Buckle and Co.* when it became due and was dishonoured; it was then returned to the plaintiff by *Buckle and Co.*, and he was debited with the amount. It appeared also, that there was sufficient property in the hands of the trustees to satisfy the compounded claims, and the plaintiff might have received the amount, as well as the other creditors; he had a claim against the defendant for goods sold and delivered, as well as upon the note. Several creditors signed the deed after the plaintiff.

Scarlett for the defendant, insisted, first, that there had been no sufficient execution of the deed by the plaintiff to bind him, since the instrument was to be considered as binding with respect to those debts only, which were set down opposite to the name of each creditor, and
1
was

was not complete till then, and that he was liable only on the covenant to release in future. In the case of *Taylor v. Homersham*, it had been held, that the obligation was to be limited by the recital in the deed. Those who signed after the plaintiff could not be misled, since they would see that the blank had been left opposite to his name. He contended, 2dly, that the plaintiff was at all events bound as to claims then existing only; and that since the plaintiff had indorsed the note over before he executed the deed, his claim to recover on the note, which was afterwards dishonoured and returned to him, could not be barred.

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HARRY
v.
WALL.

Marryatt for the defendant, answered, that by the terms of the deed the plaintiff had agreed to take 3s. 6d. in the pound, in full satisfaction of his claim. In the case of *Holmer v. Viner (a)*, it was held, that if a creditor signed under a composition deed at all, his engagement was co-extensive with his demand. In the case of *Taylor v. Homersham*, the composition was for a precise sum. And 2dly, the fact that the note was not in the plaintiff's hands at the time, was not communicated to the defendant or to the other creditors, and the note had been merely placed in the hands of the plaintiff's own bankers.

LORD ELLENBOROUGH.—If the plaintiff had made a reserve for a future specification of his debt, and had executed the deed as an escrow only, I should

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HARRY

v.

WALL.

have entertained no doubt upon the question ; but he has executed the deed without any qualification, and the leaving a blank instead of specifying the amount of his debt, is a circumstance to which other creditors might have objected, but to which he cannot object. It was not competent to him to carve out his claims and to sign for part only. If a creditor signs a deed of this nature, and declines to specify the amount of the debt for which he compounds, he should not subscribe his name in an unqualified manner, which may have the effect of inducing others to sign, under the impression that he has compounded for the whole of his demand. I am of opinion, that he has bound himself, although he has not specified his debt, to take the composition of 3s. 6d. in the pound for all his debts, whatever the amount may be.

Plaintiff nonsuited, with leave to move to set aside the nonsuit and enter a verdict for the plaintiff.

Scarlett and Campbell for the plaintiff.

Marryatt and Puller for the defendant.

In the ensuing term *Campbell* for the plaintiff moved accordingly, but the Court concurred with his Lordship, and observed, that if *Buckle and Co.* were indorsees for value, then they were creditors of the defendant for the amount of the note, but that they were mere agents of the plaintiff, who was there-

therefore a creditor of the defendants on the note when he executed the deed.

1817.

HARRY

WALL.

YORK SUMMER ASSIZES.

DOE, on the Demise of BLAND *v.* SMITH.

THIS was an action of ejectment brought to recover certain premises in the possession of the defendant, *Smith*.

The lessor of the plaintiff relied upon proof, that the house in question had been purchased by him from the sheriff, who sold them under a writ of *feri facias*, issued against the defendant, at the suit of *Bland*, the lessor of the plaintiff; the writ was produced, and the sale proved.

On the part of the defendant it was contended, that the plaintiff must prove the judgment as well as the writ.

On the part of the plaintiff it was answered, that a purchaser from the sheriff had nothing to do with the judgment; the lessor of the plaintiff did not claim as a judgment creditor, but as any other purchaser under a public sale by the sheriff, who could not be at all affected by any vice in the judgment itself; for if the judgment were to be set aside, the sale by the sheriff would still remain unimpeached.

For the defendant it was replied, that the lessor of the plaintiff was privy to his own judgment,

and

A lessor in ejectment, who claims title as a purchaser from the sheriff who sells by virtue of a *feri facias*, at the suit of such lessor, must prove the judgment as well as the writ.

1817.

DOE Dem.

BLAND

v.

SMITH.

and therefore that any rule in favour of a stranger, did not apply to their case.

WOOD, Baron, inclined to the opinion, that the evidence of the writ to the sheriff, and the sale by him, were sufficient without proof of the judgment, but reserved the point.

Raine and *Tindal* for the lessor of the plaintiff.
Richardson for the defendant.

The Court of *King's Bench* were of opinion, that the judgment ought to have been proved, and directed a nonsuit to be entered.



KAY and Another, Assignees of *HOLDSWORTH*
v. *STEAD*.

In an action by the assignees of a bankrupt, where the proceedings under the commission, are read by virtue of the statute; a deposition, in which it is stated, that

THIS was an action of assumpsit by the plaintiffs, as the assignees of *Holdsworth*, a bankrupt, for goods sold and delivered by the bankrupt, before his bankruptcy, to the defendant.

No notice of disputing the bankruptcy having been given, according to the provisions of the statute 49 G. 3. c. 121. s. 10. the proceedings under the commission, were read in evidence.

the deponent saw the bankrupt execute an assignment of all his effects, &c. is sufficient evidence of the act of bankruptcy, without producing the assignment.

In

In the deposition which was read, in order to prove the act of bankruptcy, it was stated, that the deponent had witnessed the execution (by the bankrupt) of a deed of assignment, of the whole of the bankrupt's effects, to one *Benjamin Dawson*, as a trustee for the creditors, with power to dispose of the same for the benefit of the creditors.

1817.
KAY
and Another
v.
STEAD.

Williams for the defendant objected, that this was not sufficient evidence of the act of bankruptcy, without the production of the deed itself, since the statute merely made the depositions evidence, without at all altering the rules of evidence; and that consequently the effect was just the same as if a witness had been called, and had stated, that he had seen a deed of assignment duly executed, but without producing the deed itself; but —

WOOD, B., was of opinion, that the deposition was sufficient evidence of the assignment, without producing the deed itself, and the plaintiffs had a verdict.

Hardy and *Starkie* for the plaintiffs.

Williams for the defendant.

1817.

TEALBY v. GASCOIGNE.

In an action against the sheriff, in order to connect him with the act of his bailiff, it is sufficient to produce the writ, with the name of the bailiff indorsed upon it, in the sheriff's office; it being the course in the sheriff's office, to indorse upon the writ, the name of the bailiff by whom it is to be executed.

THIS was an action against the sheriff of *Yorkshire*, for the act of his bailiff.

In order to connect the defendant with the bailiff, the plaintiff offered in evidence the writ, with the name of the bailiff indorsed upon it; it was also proved, that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it; and it was proved to be the custom of the office to indorse upon the writ, the name of the bailiff who is to execute the process.

Richardson for the defendant, objected, that this was not sufficient without also producing the warrant; but —

RICHARDS, C. B., was of opinion, that this evidence was sufficient to connect the defendant with the act of the bailiff, and the acts of the latter were accordingly admitted in evidence. (a)

Scarlett and Park for the plaintiff.

Richardson for the defendant.

(a) See *Tyler v. The Duke of Leeds*, *infra*, and *Blatch v. Archer* *Coamp.* 66.

ROBERTS v. SIMPSON.

1817.

THIS was an action on a special agreement relating to certain coal mines, and also for use and occupation.

On the part of the defendant it was contended that the plaintiff had conveyed the estate containing the coal mine to a trustee in fee; but it did not appear, nor was it suggested, that the defendant had ever been prevented from working the mines according to the agreement.

The trustee having been served with a *subpoena duces tecum*, to produce his title deeds belonging to the estate, demurred to the production, and —

RICHARDS, C. B., held, that he could not be compelled to produce them. (a)

Scarlett and *Richardson* for the plaintiff.

Hullock, Serjeant, and *Littledale*, for the defendant.

A defendant who has worked coal mines without interruption, in pursuance of an agreement with the owner, cannot, upon the trial of an action against him for a breach of the agreement, compel a third person to produce his title deeds, by virtue of which he is entitled to the legal estate in which the premises are situated, as a trustee.

(a) See *Copeland v. Lewis*, *supra*, vol. i. 95.

1817.

ANDERSON v. SANDERSON.

Where the wife of the defendant alone transacts the business at home, and purchases all the articles used in their trade, her admission as to the state of the accounts between the plaintiff, who has supplied goods to her to be used in the trade, and her husband is evidence against the latter.

THIS was an action for goods sold and delivered. The defendant had pleaded the general issue, and the statute of limitations.

The only question was, whether the action had been barred by the statute of limitations. In order to take the case out of the statute, it was proposed to give in evidence, admissions made by the wife of the defendant. It was proved that the defendant himself was usually occupied in travelling about the country, for the purpose of vending his cakes and confectionary, and that his wife conducted the business at home, and had acted as her husband's agent in buying and selling articles in the way of their business; that she usually purchased the flour which they used; the present demand was for flour to be used in the course of their trade; under these circumstances, it was contended on the part of the plaintiff, that the husband had constituted his wife his agent for the management of his business, and that her admission was sufficient to take the case out of the statute of limitations.

This evidence was objected to on the part of the defendant; but —

RICHARDS, C. B., was of opinion, that the evidence, under the circumstances, was admissible, the wife was the only person accustomed to purchase such goods, and she was therefore the agent
of

of the husband to transact such business, and he was consequently bound by her admission, as to the state of the accounts. (a)

1817.

ANDERSON

vs.

Verdict for the plaintiff. SANDERSON.

Starkie for the plaintiff.

Williams and *Gilby* for the defendant.

(a) See *Bentley v. Cooke*, 2 T. R. 265. *Barber v. Dixie*, Cas. temp. Hard. 252. *Davis v. Dinwoody*, 4 T. R. 678. 3 P. W. 238. Salk. 350. Vern. 60.

REX v. MEAD and Another.

THIS was an indictment under the statute of 43 G. 3. c. 58., for maliciously cutting one *Joseph Trott*, with an axe, with intent to murder him.

A plaintiff of the name of *Dawson* had sued out a bailable latitat against *William Mead*, one of the defendants, directed to the sheriff of *Yorkshire*; this writ was not produced at the trial, but a warrant was produced, and was proved to have been duly signed and sealed in the under-sheriff's office, directed to *Morley*, a bailiff, and two others, in the usual form, directing them to arrest *William Mead*. *Joseph Trott* had acted as the assistant of the bailiffs, in attempting to execute this warrant; and it was in resisting the execution of this warrant that the offence was alleged to have been committed.

In order to make the killing a bailiff, in resisting the execution of meane process in a civil action amount to murder, it seems to be necessary to prove the writ as well as the sheriff's warrant to the bailiff.

And such homicide will not amount to murder, if the bailiff attempt to execute a writ without a *non omittas*

clause within an exclusive liberty.

Gilby

1817.

REX

v.

MEAD

and Another.

Gilby for the prisoners objected, that it was necessary to prove the writ as well as the warrant, since the bailiff was merely the minister of the sheriff, and could not be in a better situation than the sheriff would have been in, had he executed the process himself, and he would have been a trespasser, if he he had not shewn the writ.

Tindal and *Starkie* for the prosecution, contended, that the situation of the bailiff was very different from that of the sheriff, the bailiff had nothing to look to but the warrant, he knew no other authority, and it was sufficient for his protection that the warrant was legal in its frame. The legality of the warrant, as collected from the contents, appeared in the decisions upon the subject, to be considered the proper test, where, upon prosecutions for murder, the question turned upon the authority of the officer to arrest; and they referred to *Harris's* case (*a*), and Sir *M. Foster's* Discourses (*b*), That it was the duty of a party, against whom a warrant was directed, and which was regular in its frame, to submit himself in the first instance, to the authority of the law, and he might afterwards, if the arrest was not a legal one, obtain redress by means of a civil action.

Wood, Baron, intimated his opinion, that the proof of the warrant, without proof of the writ also, was insufficient; but said that he would hear the further circumstances of the case.

(*a*) East. P. C. addenda 18.(*b*) C. 8. s. 8.

It afterwards appeared that the warrant had been executed upon *William Mead* at *Stanton Dale*, within the liberty of *Pickering Lyth*; and the under-sheriff for the county of *York* stated, that whenever warrants were to be executed within that liberty, they were directed to the chief bailiff of the liberty, who made his return to them : and that warrants in such cases were never directed to the bailiffs of the sheriff of the county of *York*.

1817.
 REX
 v.
 MEAD
 and Another.

On the part of the prosecution, it was submitted, that although a bailiff who arrested a defendant within a liberty without a *non omittas* clause in the writ might be amenable to the lord, the arrest could not be considered as a trespass against the defendant himself; but —

Wood, Baron, was of opinion, that a bailiff, under such circumstances, must be considered as a trespasser (a), and the prisoners were acquitted.

Tindal and *Starkie* for the prosecution.

Gilby for the prisoner.

(a) See Hale, H. P. C. 458., where it is laid down, that if the process be executed out of the jurisdiction of the Court, the killing of the minister is only manslaughter ; and so it is, if the issuing of the process were void and *coram non judice*.

TOWN OF NEWCASTLE-UPON-TYNE.

1817.

REX v. SMITH.

In order to warrant the admission of a deposition of the deceased against the prisoner, on an indictment for murder, it is not necessary that the prisoner should have been present the whole of the time during which the deposition was taken, the deponent having been re-sworn in the presence of the prisoner, and the part of the deposition, which had already been taken, having been read over to the prisoner and sworn by the deponent to be true.

THE prisoner was indicted for the wilful murder of *Charles Stuart*, on the night of the 3d of September, 1816.

It appeared that the prisoner, on the 4th of September, was brought before two magistrates upon a charge of assaulting *Charles Stuart*, and of having robbed a manufactory which *Stuart* had been employed to guard. The principal question was, as to the admissibility of the deposition of the deceased, which was taken before the magistrates upon that occasion, under the following circumstances.

The clerk of the magistrates took down the deposition of the deceased, which he produced at the time. The oath was administered to the deceased before any part of the deposition was written, and the clerk then proceeded to take down his statement. The prisoner was not present when the deceased commenced his statement, and when the magistrate's clerk began to take it down in writing. The prisoner was brought into the room, before the examination was finished, and before the last three

three lines were written down. The prisoner was then informed that the magistrates were taking the deposition and he was desired to attend. The oath was then again administered to the deceased, in the presence of the prisoner, and the whole of the deposition, which had been already committed to writing from the mouth of the deceased, was read over to the prisoner very distinctly and slowly. After this had been done, the deceased was asked, in the presence and hearing of the prisoner, whether what had been so written was true, and what he meant to say, and the deceased answered that it was perfectly correct. The magistrates then proceeded to examine the deceased further, and the deceased stated, in the presence and hearing of the prisoner, that which was stated in the last three lines of the deposition of the deceased. The deceased appeared to be perfectly collected at the time.

The prisoner was asked afterwards, whether he chose to put any questions to the deceased, but he did not ask any, he merely said, "God forgive you, *Charles*." The deceased signed the deposition in the presence of the magistrates, and of the prisoner, and after he had signed it, the magistrates signed it in the presence of the deceased, and of the prisoner.

On the part of the prisoner it was objected, that the deposition of the deceased could not be read in evidence; first, because the prisoner did not hear the questions put or the answers given, and had not had the opportunity of seeing the manner in

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REX
v.
SMITH.

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v.

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which the answers were given, except as to the last three lines of the deposition, and therefore, it was contended, that the case did not come within the statutes 1 and 2 *Ph. & Mary*, c. 13., and 2 and 3 *Ph. & Mary*, c. 10., which made depositions in any case evidence; and secondly, because the examination under those statutes is confined to the offence with which the prisoner is charged at the time; that the prisoner, in this case, was charged with an assault and robbery, and therefore, although the deposition in question might possibly have been admissible in evidence, upon an indictment for the assault, or for the robbery, it could not be admitted upon the trial of the present charge, which was for murder, no such offence having been committed at the time when the deposition was taken; but —

RICHARDS, C. B., was of opinion, that the evidence was admissible, since the deceased had been resworn in the presence of the prisoner, and had repeated what he had stated before, and the prisoner therefore had had an opportunity of cross-examining him. His Lordship also cited the case of the *King v. Radburne (a)*, where the deceased had been examined in the presence of the prisoner, and the deposition had been read upon the trial.

The jury found the prisoner guilty.

Richardson and Grey for the prosecution.

Alderson for the prisoner.

(a) 1 Leach, C. C. L. 512, 3d. Ed.

RICHARDS, C. B., afterwards respited the execution, in order that the opinion of the twelve judges might be taken, as to the admissibility of this evidence, and a great majority of the judges being of opinion that the evidence had been properly received, the prisoner was executed. (a)

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v.
SMITH.

(a) I have been informed that all the judges were present except GIBBS, L. C. J.; and that ten out of the eleven who were present, were of opinion, that the evidence had been properly received. The two statutes of *Pb. & M.* seem to have been passed without any direct intention on the part of the legislature, to use the examinations and depositions as evidence upon the trials of felons. The first of these statutes, *viz.* the 1 & 2 *Pb. & M. c. 13.*, was made for the express purpose of laying a restraint upon justices of the peace in exercising their power of admitting felons to bail, and is limited to those cases where the party charged is admitted to bail: and the second of these statutes, *viz.* the 2 & 3 *Pb. & M. c. 10.* extends similar provisions to cases where the prisoner is committed, in order, as it seems, to ascertain whether the witnesses are consistent in the testimony, and neither of these statutes manifests any direct intention of the legislature to make these documents evidence. See the observations of *Grose, J., Leach, C. C. L.* 3d ed. 625. But the taking of such depositions, having, in cases of felony, been sanctioned by the legislature, became it seems admissible in evidence, upon the rules and principles of evidence already esta-

blished. The effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extrajudicial*; and therefore where the depositions are not regularly taken within these statutes, they cannot be read, because there the same objection prevails, which existed as to all such depositions before these statutes, *viz.* that they are unwarranted and extrajudicial; consequently, examinations and depositions taken in a case of misdemeanour, cannot be read in evidence, because the statutes apply to cases of felony only, *R. v. Payne*, Salk. 281. 5 Mod. 183.

In the above case, it is clear that the proceeding was not extrajudicial, since the prisoner was charged before the magistrates with having committed a *felony*. It seems, that at common law, a deposition, judicially taken in one proceeding may be used in another proceeding between the same parties, the party against whom the evidence is offered, having had an opportunity to cross-examine in the former proceeding.

See Lord *Palmerston's* case cited by Lord *Kenyon*, 4 T. R. 290. *Pyke v. Grouch*, Lord Raym. 730. *Pilton v. Walker*, Str. 162. *Green v. Gatewick*,

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v. *Gatewick*, B. N. P. 243. 12 Mod. 319. *Barnard*, K. B. 243. And the same principle seems to apply to criminal cases.

In the above case, the deposition was warranted by the statute, it was taken under the sanction of an oath, and the prisoner had an opportunity to cross-examine.

In *Radbourn's* case, Leach's C. C. L., 3d Ed., the deposition of the deceased was read, and therefore the objection, that the offence

must be complete at the time of the examination if available, would have operated to the rejection of the deposition in that case; the prisoner, previous to the death of the injured party, cannot, in any case, be charged with the murder as an offence already consummated, and therefore, to reject the deposition of the deceased in such a case, would be to exclude the deposition of the deceased altogether in cases of homicide.

CARLISLE SUMMER ASSIZES.

HARTLEY v. HALLIWELL.

In a declaration for keeping a dog which killed several of the plaintiff's sheep, it is alleged, that the defendant knew that the dog was accustomed to bite and kill sheep. Proof must be given that the dog had previously bit sheep, and the fact cannot be inferred from the circumstance of the dog's having before sprung upon a man.

THIS was an action on the case for keeping a dog which had killed several of the plaintiff's sheep.

The declaration contained two counts, in both of which it was alleged, that the defendant knew that the dog was accustomed to bite, worry, and kill sheep and lambs.

It appeared that the defendant kept two pointers and a terrier, and that one of them had barked at and risen against one of the plaintiff's servants, but had not actually bit him. It also appeared that the dog had run after sheep, and had been called off from the pursuit, but there was no evidence that any of them had ever bit any sheep. The defendant

had

had declared that he kept the dogs for the purpose of protecting his house, and that if it were necessary, he would keep fifty more.

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On the part of the defendant it was objected, that there was no evidence of the allegation in the declaration, that the dog was accustomed to bite sheep, or that the defendant knew it.

On the other hand, it was contended, that it was sufficient to prove that the dog was mischievous, and that the defendant knew him to be so; and 1 *Lord Raym.* 110. was referred to, where it is laid down, that if a man keep a dog which bites sheep, and he has notice of it, and afterwards the dog bites a mare, an action is maintainable. It was also contended, that there was sufficient evidence, from which the jury might infer a knowledge on the part of the defendant, that the dog had actually bit sheep.

WOOD, B., left it to the jury, upon the evidence to say, whether the defendant's dog had done the injury complained of, and whether the dog had been accustomed to bite sheep, and whether the defendant had had notice of this propensity.

The jury found for the plaintiff.

A rule *nisi* having afterwards been obtained, to shew cause why a new trial should not be had, *Little-dale* contended on the part of the plaintiff, that there was sufficient evidence to enable the jury to infer, that the defendant's dog had been accustomed to bite

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HARTLEY
v.
HALLIWELL.

bite sheep, since there was evidence that he had pursued sheep, and the presumption was, that this had been done with a hostile intention. The dogs had not been kept for the purpose of killing game, but as house dogs.

It was also contended, that it was not necessary to shew that the dog had bit any sheep, and the case of *Judge v. Cox (a)*, was referred to, where a similar fact had been inferred, from the declaration of the defendant. Here the dog had been called off from the pursuit of the sheep by some one, and it was sufficient if this had been done by some one employed by the defendant. If proof of an actual previous biting were necessary, the consequence would be, that damages would never be recovered occasioned by the first offence of a dog.

The Court were of opinion, that the plaintiff had bound himself by the particular framing of the declaration, to prove the injury to have been of the particular kind alleged. For if the allegation, that the dog was accustomed to bite sheep were to be struck out of the declaration, it would not contain enough to support the action, unless it were to be proved that every dog which would jump at a man would bite sheep, the fact could not be inferred from the former act. And the rule for a new trial was made absolute. (b)

(a) *Supra*, vol. i. p. 285.

(b) Lord *Ellenborough* and *Bayley*, J., intimated that the declaration might have been framed more generally, by alleging that the dog was of a ferocious and savage dis-

position, and ought not to be left at large. *Abbot*, J., said, that such a declaration would be supported by the facts, but that whether it would be good in law, it was not necessary to consider.

LANCASTER SUMMER ASSIZES.

RHODES and Another v. AINSWORTH.

1817.

THIS was an issue to try whether the inhabitants of the chapelry of *Milne Row*, which was situated within the parish of *Rochdale*, were bound by immemorial custom to contribute to the repairs of the parish church. By the terms of the issue, the affirmative of this proposition was to be proved by the plaintiff.

The owner of landed property within a chapelry is not a competent witness to relieve the inhabitants of the chapelry from the permanent burthen of repairing the parish church, although the witness does not reside within the chapelry, and his lessee for years of his estate within the chapelry is bound to pay all rates.

On the part of the defendant, a witness of the name of *Mills* was called, of the age of seventy-five, in order to disprove the custom alleged by and insisted upon by the plaintiffs, and to shew that no repairs had been made by the inhabitants of the chapelry within his memory. Upon the examination of this witness upon the *voir dire*, it appeared, that he was the owner of a small house and a parcel of land, situate in the chapelry of *Milne Row*; that he resided in the county of *York*; that his property in the chapelry was leased to a tenant; and that he was not liable to the payment of any rates, the tenant having agreed to pay a

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RHODES
and Another

v.
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gross-rent without any deduction, and that several years of the lease still remained unexpired.

The counsel for the plaintiff objected, that the witness was incompetent, since he was interested to discharge the chapelry in which he had property from the burthen of repairing the parish church. The effect of his evidence was to get rid of a burthen which would render his property less valuable.

On the part of the defendant, it was answered, that the witness had no existing interest, since he was not the occupier of the estate, and possibly never might be; the rate was upon the occupier and not upon the owner. And the case of *The King v. Kirdford* (a) was cited, in order to shew that in order to incapacitate a witness, his interest must be an existing interest, and not merely an expected and doubtful interest; the present case, it was contended, was stronger than the case cited, for there the witness's name had been omitted out of the rate, for the express purpose of making him a competent witness. The case of the *Sadlers Company v. Jones* (b), was also cited for the same purpose; but —

Wood, B., was of opinion, that although the witness could not be called upon at present to pay any rate, whatever the result of the cause might be, yet, that as the owner of the fee he had

(a) 2 East, 559.

(b) 6 Mod. 166.

an interest in removing a permanent incumbrance from the estate. His property in the chapelry would be affected by the event.

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 RHODES
 and Another
 v.
 AINSWORTH.

The witness was accordingly rejected.

Verdict for the plaintiffs.

Scarlett and *Richardson* for the plaintiffs.

Topping, *Littledale*, and *Williams* for the defendant.

In the ensuing term, *Topping* moved for a new trial, on the ground that the evidence of the witness ought to have been received; but the Court were of opinion, that the evidence had been properly rejected. The witness was not interested in the particular and specific rate, but he was interested in the question of rateability. The verdict for the plaintiff would bring a *permanent* charge upon his property, and render the fee simple of less value. (a)

(a) See Mr. *Evans*'s observations on the case of *The King v. Kirdford*, in his edition of *Pothier*, vol. ii. p. 306.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings after Michaelmas Term,
58 GEORGE III.

WESTMINSTER.

TYLER v. The DUKE of LEEDS.

The return
purporting to
be made by a
lord of a manor
to the sheriff's
mandate to
levy under a
writ of *fieri*
facies, is *prima*

THIS was an action against the Duke of *Leeds*, as lord of the manor of *Wakefield*, for a false return of *nulla bona*, to a mandate from the sheriff of *York*, upon a writ of *fieri facias*, to levy the sum of 411*l.* 3*s.* 11*d.*, upon the goods of *John Shaw*, at the suit of the plaintiff.

facie evidence, that the person whose return it purports to be is the lord of the manor. — Evidence that the person who actually made the return, has acted as bailiff to the lord of the manor for sixteen years, and during that time has made the returns for the lord of the manor, is sufficient to charge the lord of the manor with the acts of the bailiff. — In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud. — In an action against the sheriff for not selling the joint property of A. and B., under an execution against the goods of A, (*semble*) half the value of the goods, is the proper measure of damages.

In

In order to prove that the Duke of *Leeds* was the lord of the manor of *Wakefield*, and that a witness of the name of *Scott* had acted upon the present occasion as his bailiff, the plaintiff proposed to read an examined copy of the mandate to the Duke, and also an examined copy of the return to the mandate, and *Scott* stated, that he had acted as bailiff of the manor for sixteen years, but that he had never seen the Duke; that he had received the mandate from the sheriff, and had made the return upon it, and sent it to Mr. *Lambe* the deputy steward of the lord of the manor, in the same manner as he had made returns to all other mandates for sixteen years past.

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 TYLER
 v.
 The Duke of
 LEEDS.

It was objected, on the part of the defendant, that it was necessary for the defendants, before the return purporting to be that of the Duke of *Leeds* could be read, to prove, that he was the lord of the manor of *Wakefield*; and also, that it was further necessary to shew, that *Scott* was the authorized bailiff of the Duke, before his acts were admitted in evidence; but —

Lord ELLENBOROUGH was of opinion, that the return was *prima facie* evidence that the Duke was the lord of the manor, and that by making this return, he had adopted the acts of *Scott*, who had been his agent for sixteen years.

It afterwards appeared, that the bailiff had seized certain goods at *Halifax* by virtue of the
 mandate,

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TYLER
v.
The Duke of
LEEDS.

mandate, as the joint property of *Shaw* and one *Bateman*, of which *Bateman* was in the possession, and that *Bateman* having claimed the whole as his separate property, the bailiff had at length relinquished the property, on receiving an indemnity bond from *Bateman*. The witness stated, that he had heard both *Shaw* and *Bateman* several years before declare that they were partners.

It was objected on the part of the defendant, that *Shaw's* declarations on the subject were not admissible.

LORD ELLENBOROUGH. — Their acts are but indirect declarations. If they are rational agents, what they say is evidence. They are declarations made *ante litem motam*, they were made four years ago.

Scarlett for the defendant stated, that the judgment against *Shaw* arose out of a fraudulent contrivance between the present plaintiff, *Tyler*, and *Shaw*, to defraud the creditors of the latter. That *Shaw* had made a fraudulent assignment to the plaintiff of all his property, and he contended, that he was at liberty to go into evidence, to shew that the judgment on which the execution had been sued out against *Shaw* was founded on a fraudulent debt, and could not be supported, and that the sheriff might take advantage of this fraud, and consequently that the present action could not be supported, and he cited *Latch. 222*.

Lord

LORD ELLENBOROUGH. — The question which I have to try is, whether *Shaw* was a partner in these goods ; and if he was the proprietor, even supposing that there was some collateral fraud, I must apply my mind to the question of property. To a certain degree, I admit the authority of the case cited, although I do not think it is a convenient mode of trying the question of fraud. Some species of fraud I might admit as collusive, but I do not think that the evidence points at such a case. To say that the judgment is absolutely void, embraces too large a scope ; it would endanger all returns ; if you can shew that it is clearly void under the statute, I will admit the evidence ; but it must be clearly and manifestly so ; you cannot go into all the circumstances between the parties ; the indemnity to the defendant may turn out to be insufficient. If you can attach the judgment on any clear and palpable ground, I will hear you.

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v.

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LEEDS.

Scarlett, in addressing the jury on the quantum of damages, contended, that although joint property to the amount of 411*l.* had been seized, the jury ought not to give damages to the full amount of one-half the value, since if *Shaw's* share of the property, which consisted chiefly of machinery, had been sold by auction, the purchaser who must have bought the property, subject to the controul of *Bateman*, who would still have been the proprietor of one undivided half, would have given a speculative

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v.

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LEEDS.

lative value only, and not one half of the real value of the goods.

LORD ELLENBOROUGH. — The goods of the value of 411*l.* were the joint property of *Bateman* and *Shaw*. The prejudice to the plaintiff arises from the defendant's not having sold *Shaw*'s share of the joint property, in which the purchaser would have been a co-partner. I cannot lay down any measure for your assessment of damages short of half the value; in giving any other, you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, others might not regard the circumstance; and I am at a loss to know what other measure than one-half can be adopted. I leave it however to you to say whether you can safely pursue any other line, and to find accordingly.

Verdict for the plaintiff, damages, 50*l.*

Topping, Marryatt, and Campbell for the plaintiff.
Scarlett, Richardson, and Chitty for the defendant.

GUILDHALL.

Adjournment Day after Michaelmas Term,

58 GEORGE III.

SMITH v. BELLAMY.

1817.

Monday,
Dec. 1.

THIS was an action by the plaintiff, as the indorsee of a bill of exchange, against the defendant, as the drawer and indorser.

In an action by a second indorsee, against the drawer of a bill of exchange, payable to his own order, proof that the bill purported to have been accepted, when it was indorsed to the plaintiff, does not supersede the necessity of proving an actual acceptance.

The bill was drawn upon one *Stevenson*, payable in *London*, and purported to have been accepted by *Stevenson*, payable at *Spooner and Atwood's*; it had been indorsed by the defendant to *Harrison*, and by *Harrison* to the plaintiff.

The declaration contained four counts, the first two counts alleged an acceptance by *Stevenson*. The third count alleged an acceptance by *Stevenson* in *London*, and a presentment there, and that after due search and inquiry there, *Stevenson* could not be found. The fourth count alleged, that when the bill was delivered to the plaintiff, it had a writing upon it, purporting to be the acceptance of *Stevenson*, and that he could not be found, of which the defendant had notice, &c.

The plaintiff in such case, must either allege and prove an actual acceptance, or

charge the drawer with having drawn the bill upon a non-existing person.

It

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SMITH

v.

BELLAMY.

It appeared that on the 8th of *September*, when the bill became due, it was presented at *Spooner* and *Atwood's* in *London*, and dishonoured. On the 9th, notice of the dishonour was sent to the plaintiff's bankers at *Pontefract*, who received it on the 11th, and that the latter gave notice to the plaintiff, who resided at *Nottingham*, a few miles from *Pontefract*, on the 12th; and that notice was sent on the same day by the plaintiff to *Stevenson*, who lived at *Hull*, and also to *Bellamy* and *Harrison*. It appeared that when the bill was indorsed by *Harrison*, the acceptance, purporting to be that of *Stevenson's*, was upon the bill.

It was objected on the part of the defendant, that it was necessary to shew, either that *Stevenson* had accepted the bill, or that the bill bore the acceptance purporting to be his, when it came out of the hands of the defendant; and also, that a presentment in *London* was not sufficient.

Denman for the plaintiff contended, that there was evidence to go to the jury, upon which they might presume, that the bill came out of *Bellamy's* hands with *Stevenson's* acceptance upon it; and that a presentment in *London* was sufficient, since the bill was made payable in *London* by the drawer. At all events, the evidence supported the fourth count; and the defect, if there was one, was upon the record.

LORD ELLENBOROUGH. — You must declare either on the acceptance as a genuine one, in which
5 case

case you must prove a presentment to that person for payment, or you may charge the defendant with having drawn the bill on a non-existing person, whereby the drawer himself is liable, or having given the acceptor a name, it may be alleged, that due search has been made after him, and that no such person can be found; but there is no third mode of proceeding. In order to render the act of *Stevenson* available, it must first appear that he was the acceptor of the bill.

1817.
SMITH
v.
BELLAMY.

Plaintiff nonsuited.

Denman and *Phillips* for the plaintiff.

Scarlett and *Richardson* for the defendant.

ROBERTS and Others v. JACKSON and Others.

THIS was an action of *indebitatus assumpsit*, for work and labour, &c.

The plaintiffs were ship-brokers, and the action was brought against the defendants, as the owners of the ship *Quebec*, for procuring a charter-party for the ship, and for the expences of the charter-party. The plaintiffs claiming five *per cent.* upon the whole voyage out and home, and the defendants contending that the plaintiffs were entitled to no more than five *per cent.* on the outward voyage, and two and a half *per cent.* on the homeward voyage.

The plaintiffs, at the instance of the defendants, had procured the ship to be chartered to Mr. *Bonelli*,

A broker who procures a charter-party for a vessel to Rio Janiero, where a gross sum is to be paid for the voyage out and home, is entitled on a *quantum meruit* to 5 *per cent.* on the gross sum although the payment of part be contingent on the arrival of the vessel home.

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ROBERTS
and Others

v.

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and Others.

Bonelli, from *London* to *Rio Janeiro* and back. By the terms of the charter-party, the plaintiffs were to be paid as follows ; by a bill on *Bonelli* for 500*l.*, drawn at the end of ten weeks from the clearance of the vessel outwards ; by a bill for 300*l.* more, after the vessel had completed her delivery upon the outward voyage ; and the remainder by bills, depending on the event of the vessel's return. On the whole, the freight amounted to the sum of 1600*l.* Evidence was adduced to shew, that where ships are chartered to *Mogadore*, to the *Mediterranean*, to *Quebec*, *America*, the usual practice was, for the broker to charge five *per cent.* on the gross sum paid. There was no evidence as to the usual charge for a vessel chartered to *Rio Janeiro*. It was stated that the duty of the broker, in respect of the homeward cargo, was to report the ship inward, and to collect the freight ; and that he was considered to be entitled, whether the ship was lost or not.

LORD ELLENBOROUGH in summoning up to the jury said, the only question is, whether the plaintiffs are entitled to five *per cent.* on the gross sum of 1600*l.* for the whole of the voyage, or to two and a half only upon the homeward voyage. The allowance and custom of trade is the only medium, in the absence of a special contract, to ascertain what is due. It is to be lamented, that in such cases, no special contract is made, which would obviate all difficulty upon the subject. The question is, what the plaintiffs deserve for their trouble, and they deserve what is usually allowed in the trade.

It

It has been stated in evidence, that when a gross sum is to be paid for the whole voyage, five *per cent.* on that sum is usually paid. My difficulty is, whether the rule applies to this case, since part was payable after the arrival of the vessel homeward; and therefore, the case involves the contingency of the arrival of the vessel.

The jury found a verdict for the plaintiff, giving five *per cent.* on the gross sum.

Gurney and Tindal for the plaintiff.

Marryatt for the defendant.

1817.

ROBERTS
and Others

^{v.}
JACKSON
and Others.

KING'S BENCH.

SITTINGS AT WESTMINSTER.

NICKSON' v. JEPSON.

December 2d.

THIS was an action for goods sold and delivered.

The defence was, that the time of credit had not expired, at the time when the action was brought.

It appeared, that when the goods were ordered, the plaintiff engaged to give three months credit; and agreed that if the defendant, at the end of that period, wished for further time, he would take his

Goods sold at three months' credit, the vendor agreeing to take the vendee's bill of exchange, at three months date, at the end of the first three

months, if he wished for further time. Unless the vendee give such a bill, at the end of the first three months, the vendor may bring his action immediately.

Q 2

bill

1817.

NICKSON

v.

JEPSON.

bill of exchange for the amount, payable in three months more.

On the part of the defendant it was contended, that this in fact constituted a credit for six months, and that the plaintiff having brought his action before the expiration of that time, must be nonsuited, and the case of *Mussen v. Price* (a) was cited; — but,

LORD ELLENBOROUGH held, that the action was not premature; the plaintiff had agreed, if the defendant wished it, to give further time; but the defendant was to give to the plaintiff his bill at three months, as the price of that indulgence. It was incumbent upon him to give such a bill, if he wished to avail himself of the indulgence offered to him.

Verdict for the plaintiff.

Scarlett and Pollock for the plaintiff.

Gurney and Chitty for the defendant.

(a) 4 East. 147.

PARKER v. LEIGH.

An acceptor of a bill of exchange cannot avail himself of a renunciation on the part of the holder of

his claim upon him, unless it be express, and founded upon some consideration.

THIS was an action by the indorsee against the defendant as the acceptor of a bill of exchange for 300*l.* drawn by *G. Williams*, on the defendant, payable to his own order.

The

The defence was, that the plaintiff had renounced his claim upon the bill, as against the defendant. It appeared, that the plaintiff having threatened proceedings against the defendant, the solicitor of the latter applied to know what the amount of his claim was, and found that the plaintiff had judgments against the defendant, on warrants of attorney, to the amount of 700*l.*; and that the bill in question was included in an account shewn by the plaintiff, but that the plaintiff said, that as to the sum in the bill for 300*l.*, he should look to *Williams* for it; that the sum of 160*l.* was due upon it; and that he held the warrant of attorney, of an *Irish* baronet, for the amount; and that he wanted no more from the defendant than was included in the warrants of attorney. The defendant's solicitor stated also, that upon the supposition that these included the whole of the plaintiff's demand, he paid the amount, which otherwise he should not have done.

1817.

PARKER
v.
LEIGH.

Denman for the defendant contended, that under these circumstances, the plaintiff having recovered the claim on the bill, and the amount of the demand having been paid upon the understanding that the plaintiff had no other claim against the defendant, he was not entitled to recover on the bill; and he cited *Ellis v. Galindo*. (a)

LORD ELLENBOROUGH. — If he does not expressly renounce all claim upon the security, it

(a) *Douglas*, 250. in the note.

1817.

PARKER
v.
LEIGH.

still remains valid in point of law. If the party were to forego a bill in equity on that account, it would be a good consideration for a renunciation of part of his claim, but the ground of renunciation must be distinctly proved. The plaintiff probably might suppose, that *Williams* would pay the bill, and that he should not have occasion to call upon the defendant. I am of opinion, that in point of law, the circumstances do not amount to an express renunciation, and nothing short of that will be sufficient to discharge the defendant from his acceptance of the bill.

Marryatt contended, that the plaintiff was entitled to recover the whole amount of the bill ; — but,

Lord ELLENBOROUGH held, that he was not entitled to recover more than the sum of 160*l.* ; which he had admitted to be all that was due upon the bill.

Verdict accordingly.

See *Walpole v. Pulteney*, cited Dougl. 236. *Black v. Peale*, ib. *Dingwall v. Dunster*, Dougl. 235. 247. Bayley on Bills, 3d Ed. 92, and the cases there cited.

DOE on the Demise of LOWDEN v. WATSON.

A defendant in ejectment, who has paid rent to the lessor of the plaintiff, may shew that his landlord, pending the term, sold his interest in the premises.

THIS was an action of ejectment, to recover the possession of a house in *St. James's Square*, which the lessor of the plaintiff held of *Williams*, his superior landlord, and which he himself had let to the defendant. The plaintiff proved that the

defendant

defendant was his tenant, and had received notice to quit in *June* 1816.

1817.

DOE Dem.
LOWDEN
v.
WATSON.

The defendant gave in evidence, a declaration by the lessor of the plaintiff in 1815, that he had sold the lease to one *Wakefield*; and that he had assigned it to him, and that he had nothing more to do with it.

Topping for the plaintiff contended, that this was not sufficient; for although he had sold the lease, the legal estate, unless the contrary were shewn, still remained in him, as the trustee of *Wakefield*, and that the tenant could not dispute his landlord's title; — but,

Lord ELLENBOROUGH was of opinion, that the language of the party which was to be taken most strongly against himself, shewed, that he had transferred his property in the lease; and that the defence was not inconsistent with the admission of the landlord's title by the defendant, during the time for which he paid rent.

Plaintiff nonsuited.

Topping for the plaintiff.

Gurney for the defendant.

1817.

SAVAGE v. ALDREN.

A promissory note is made more than six years ago, and deposited with a banker, to be delivered to the payee, on his producing a certain other note cancelled. The cause of action to the payee on the first note, accrues on receiving it from the banker, and is not barred either by the lapse of six years from the date, or by the bankruptcy and certificate of the maker, which intervene between the date of the note and the time of its delivery to the payee.

THIS was an action on a promissory note, dated *December 7th*, 1817, made by the defendant, payable to the plaintiff for the sum of 100*l*. Pleas, bankruptcy and the statute of limitations.

It appeared that the plaintiff joined with three others in giving a joint and several promissory note to one *Mills*, the treasurer of a building society, as surety for one *North*, who had become entitled by lot, according to the practice of the society, to receive an advance of 100*l*. of the money belonging to the society for building. The note in question had been given by the defendant, in order to indemnify the plaintiff against the security given for *North*, and was enclosed in a letter, written by the defendant, to *Brookes*, a banker, to the following effect : —

“ Inclosed, you have a promissory note from
 “ *L. Aldren* to *George Savage*, which is intended
 “ as a security against a promissory note for the
 “ same sum given by *North*, and three sureties to
 “ the secretary of the building society. The en-
 “ closed note is not to be delivered to *Savage* till
 “ he is obliged to pay the amount; or he shews his
 “ note to you cancelled.”

It appeared that *Savage* had, by paying small sums at a time, paid the amount of his note to the building society, and that the banker, on his pro-
 ducing

ducing the note cancelled, had given up the defendant's note to him in *September* last.

It was contended on the part of the defendant, first, that the bankruptcy and certificate of the defendant in the year 1808, were a bar to the present action ; but that 2dly, if the bankruptcy was not a bar, generally, it was a bar to all that had been paid by *Savage* before the bankruptcy ; and also that the statute of limitations was a bar to the action, or, at least, to so much of the amount as had been paid by *Savage* previous to the last six years.

It appeared, upon inquiry, that all the payments had been made by the plaintiff since the bankruptcy.

LORD ELLENBOROUGH was of opinion, that the promissory note and letter were to be considered together as one instrument, and that the cause of action did not accrue until the time when the banker gave up the note, and consequently, that no part of the demand was barred, either by the certificate or the statute of limitations.

Verdict for the plaintiff, damages 103*l*.

Scarlett and ——— for the plaintiff.

Topping for the defendant.

1817.

SAVAGE.

v.

ALDEN.

1817.

Wednesday,
Dec. 3.

CLARKE, Executor of MUSGRAVE, v. FIGES.

A debtor executes a warrant of attorney to his creditor to confess judgment for the balance of account as then stated between them. The warrant of attorney is not a specialty, which takes the case out of the statute of limitations.

THIS was an action for money lent by the plaintiff's testator, and upon an account stated. Plea, the general issue, and that the cause of action did not accrue within six years.

It appeared that *Musgrave* and the defendant had had considerable dealings together, and that in 1810, the defendant had executed a warrant of attorney to *Musgrave*, to confess judgment for the sum of 200*l.*, the balance of account which was then due, and for the recovery of which, this action was brought.

The warrant of attorney contained a defeazance on the payment of the 200*l.*, with interest, on or before the 31st of *November*, 1811. *Musgrave* died in 1816; and it was admitted, on the part of the plaintiff, that he could not prove any acknowledgment of the debt by the defendant within six years; but it was contended, that this case was not within the statute 21 *J. 1. c. 16. s. 3.*, since after the warrant of attorney had been given, the action was not grounded on a contract without specialty, since, although the warrant of attorney was not put in force, it was an acknowledgment of the debt by specialty.

Marryatt for the defendant, contended, that the circumstance of the defendant's having executed this instrument, did not take the case out of the statute. The authority was merely personal to *Musgrave*,
and

and could only have been enforced by him in a personal manner. The authority died with him and could not be enforced by his representatives. The instrument was not an acknowledgment of the debt under seal, which could be declared upon. The plaintiff had declared upon an account stated, and had merely used the warrant of attorney, as an acknowledgment by the defendant, and not as the document upon which the action was founded.

1817.
CLARKE
v.
FIGES.

ABBOTT, J. — I am of opinion, that the action is brought on a contract without specialty. The warrant of attorney could not have been declared upon. I think that it is not an instrument of specialty within the statute.

Plaintiff nonsuited.

Scarlett and *Courthope* for the plaintiff.

Marryatt for the defendant.

STONE v. WHITING.

Thursday,
Dec. 4.

THIS was an action of assumpsit, to recover rent for the use and occupation of a house for one half year ending at *Michaelmas*, 1817.

The defence was, that on the 20th of *March*, the defendant, who was then the tenant of the premises, had let them to a person of the name of *Lockwood*,

place, who is accordingly substituted, determines the tenancy of the first tenant.

Semble. An agreement between a landlord and a tenant from year to year, that another tenant shall be substituted in his

1817.

STONE

v.

WHITING.

from the ensuing Lady-day, and that they afterwards went to *Stone* to inform him of what had been done, when he agreed to take *Lockwood* for his tenant from that time, and to discharge *Whiting* from further liability as tenant.

Reader, for the plaintiff, contended, that the parol discharge was insufficient to determine the tenancy of the defendant, and he cited the case of *Mollet v. Brayne* (a), where it had been held that a mere parol discharge of the tenant by the landlord was insufficient to dissolve the tenancy, since the statute of frauds (29 C. 2. c. 3. s. 3.) provides, that no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments shall be surrendered, unless by deed or note in writing, or by act and operation of law; and in that case, Lord ELLENBOROUGH had held, that the tenancy was not determined merely by the landlord giving to the tenant a parol licence to quit, and by his quitting accordingly.

HOLROYD, J. — The statute says, that the surrender shall be in writing or by operation of law. In this case there was an agreement that one should be substituted for the other as tenant, and I am inclined to think, that this constituted a surrender in law. This substitution appears to me to distinguish the case from that which has been cited, but I will save the point, if it be necessary.

(a) 2 Camp. 103.

The plaintiff afterwards went into evidence, in order to contradict the case of the defendant, and there being conflicting evidence, his Lordship left it to the jury to say, whether the plaintiff had assented to the substitution contended for by the defendant. (a)

1817.

STONE
v.
WHITING.

Reader and *Rumbald* for the plaintiff.

Gurney for the defendant.

(a) See *Roe v. The Archbishop of York*, 6 East. 86., where it was held, that the mere cancelling of a lease is not a surrender of the term within the statute; and see *Botting v. Martin*, 1 Camp. 318. *Magenis v. Mac Cullough*, Gil. Eq. Cas. 236. 2 Wils. 26, 27. and the cases cited 1 Will. Saund. 236. n. q. See also *Whitehead v. Clifford*, 5 Taunt. 518.

PRESTON v. JACKSON.

THIS was an action upon two promissory notes, the former of which (upon which alone any question arose) was dated in *August*, 1814, and was made by the defendant payable to *Wyer*, and by him indorsed to the plaintiff for the payment of 99*l*. 17*s*. 6*d*. six months after the date.

The defence as to this note was, that it was tainted with usury. *Wyer*, the payee of the note, being called as a witness for the defendant, stated, that, in 1807, he had lent the defendant the sum of 100*l*. for which he was to receive 50*l*. by way of interest,

A party cannot recover on a new instrument which operates as a security for any usurious interest, although it is founded upon a new settlement of the account between the borrower and lender, and the original securities have been cancelled.

1817.

PRESTON

v.

JACKSON.

interest, and took his bond for 150*l.*; and that in 1809, he advanced another hundred upon the same terms; but that he never received any interest till *August*, 1814, when the former securities were given up, and the account was settled, and that the note in question was then given for the interest.

Topping for the plaintiff contended, that he was, at all events, entitled to recover to the extent of the interest really due upon the sums advanced, and that although the original securities might be void as being tainted with usury, here a subsequent account had been settled between the parties and a new security given, which was available for the interest really due, and he cited the case of *Barnes v. Hedly* (a), where it was held, that after the usurious securities had been destroyed, a promise to pay the principal and legal interest was binding.

HOLROYD, J. — Where a bond or promissory note has been void on account of its being a security for usurious interest, a subsequent security for no more than the principal and legal interest has been held to be binding; but in this case, the note was given in order to secure the usurious interest, and it is therefore very distinguishable from the case which has been referred to, there the engage-

(a) 2 Taunt. 184.

ment did not extend to do more than a court of equity would have compelled him do, and there was a good consideration for his promise.

Verdict for the plaintiff on the other note.

1817.

PRESTON

v.

JACKSON.

Topping and *Espinasse* for the plaintiff.

Parke for the defendant.

PARKINS v. HAWKSHAW.

THIS was an action on a bond, conditioned for the payment of coals to be delivered by the plaintiff to one *Rencher*. Plea, *non est factum*.

The subscribing witness to the bond, stated, that he saw it executed by a person who was introduced as *Hawkshaw*, and he gave some description of his person ; but he could not identify him with the defendant in the present action.

HOLROYD, J., deemed evidence as to identity to be requisite, and he cited *Buller's Nisi Prius*, 171. A witness was then called, who stated, that he acted as agent to the attorney for the defendant, and it was proposed to examine him as to communications

the action in order to prove his identity. Declarations made by the attorney of a party in conversation are not evidence against his client.

On *non est factum* pleaded to a bond, it is not sufficient to prove the execution by a person who executed in the name of the defendant without proof of identity.

The agent of the defendant's attorney cannot be examined as to communications with the defendant on the subject of

which

1817.

PARKINS

v.

HAWKSHAW.

which he had had with the defendant, in order to shew his identity; but —

HOLROYD, J., was of opinion, that inasmuch as he was acting upon those occasions as the agent of the defendant's attorney, those communications could not be enquired into.

The attorney for the plaintiff was afterwards called, and asked as to some admission made by Mr. *Reeve*, who was the agent of the defendant's attorney, and it was contended, that an admission by the defendant's attorney, that he had signed the deed, would be evidence as to his identity as much as if it had been admitted by the defendant's attorney for the purpose of the trial; but —

HOLROYD, J., was decidedly of opinion, that matter of conversation with an attorney could not be received in evidence against his client.

Plaintiff nonsuited.

Campbell and *E. Lawes* for the plaintiff.
Scarlett for the defendant.

REX v. CLARKE.

1817.

THIS was an indictment against the defendant for an assault upon Mrs. *Webb*, with intent to commit a rape.

Upon the cross-examination of the prosecutrix, she was asked, whether she had not been sent twice to the *House of Correction*, upon charges of having stolen money from her master several years ago. She admitted that she had, and stated, that she had since been admitted into the *Refuge for the Destitute*, and had remained there nearly two years; and that she had on going away, received a box of clothes and a guinea, as a reward for her good behaviour.

On the part of the prosecution, the superintendant of the establishment, called the *Refuge for the Destitute*, was called and examined as to the conduct of the prosecutrix while she remained in that asylum, and as to the practice of conferring rewards for good conduct.

Gurney for the defendant objected, that evidence of the witness's good character could not be adduced, until her character had been impeached by evidence *aliunde*, and that the cross-examination of the prosecutrix as to her character, did not warrant the admission of such evidence.

The defendant in such case may impeach her character for chastity, by general, but not by particular evidence.

The prosecutrix of an indictment for an assault with intent to commit a rape, having been cross examined as to crimes committed by her several years before the alleged offence, evidence may be adduced to shew that her character has since been good.

The fact of her making complaint of the outrage, and the state in which she was at the time of making the complaint are evidence, although the particulars of her statement are not evidence to prove the truth of her statement.

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REX

v.

CLARKE.

Scarlett for the prosecution contended, that since the witness had been examined as to particular facts, for the purpose of impeaching her character, he had a right to call witnesses to confirm her, in the account which she had given upon her cross-examination.

HOLROYD, J.—The object of the cross-examination was to impeach the character of the witness, and to shew that she was not credible. It is shewn by this cross-examination that she has committed crimes. A witness is then examined as to her situation and conduct since, in order to repel the inference which might be drawn from her former misconduct. I do not see why such evidence may not be let in for the purpose of removing the impeachment of her character upon cross-examination, as well as if it had arisen *aliunde*. The circumstances which are offered, are offered with a view to shew that the witness is not so unworthy of credit as she might have been considered to be, if these circumstances had not intervened. It appears to me, that the evidence is admissible.

The husband of the prosecutrix being examined, as to the complaint made by the prosecutrix to him soon after the assault had taken place.

HOLROYD, J., held, that the fact of her having made the complaint was evidence, as also was the description of her state and appearance at the
 7 time ;

time ; but that the particulars of the complaint were not evidence, as to the truth of her statement.

1817.

REX

v.

CLARKE.

On the part of the defendant, it was proposed to call witnesses, for the purpose of impugning the character of the prosecutrix for chastity, both generally and particularly.

On the part of the prosecution it was objected, that since the counsel for the defendant had in the course of cross-examining the prosecutrix abstained from any questions tending to impeach her character for chastity, he could not now go into evidence as to her conduct and character for chastity, although he still might impeach her general character for veracity. That if it had been intended to discredit her for want of chastity, the question ought to have been put to the witness, in order that she might have an opportunity of denying or of explaining the circumstances alleged against her. That it would be most dangerous to permit witnesses to be called to prove that the prosecutrix was a woman of abandoned character ; no question on the subject having previously been proposed, since her character might be taken away by general evidence, without giving her an opportunity of making any answer, and without subjecting the witnesses, who gave such general evidence, to a prosecution for perjury, since they could not be indicted on such general evidence.

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v.

CLARKE.

HOLROYD, J. — It is clear that no evidence can be received of particular facts, and such evidence could not have been received, although the prosecutrix had been cross-examined as to those facts, because her answers upon those facts must have been taken as conclusive. With respect to such facts the case is clear. Then, with respect to general evidence; such evidence it has been held is admissible in all cases where character is in issue, and therefore the only question is, whether the character of the prosecutrix is involved in the present issue. In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible; but the defendant cannot go into evidence of particular facts. This is the law upon an indictment for a rape, and I am of opinion, that the same principles apply to the case of an indictment for an assault with intent to commit a rape.

General evidence was accordingly admitted.
The defendant was found guilty.

Scarlett and ——— for the prosecution.

Gurney for the defendant.

REX v. WEGENER.

1817.

THIS was an indictment against the defendant, for writing, sending, and publishing a libel on Mr. C., a solicitor of eminence.

The first count alleged, that the libel was sent to Mr. C. The second count alleged a publication generally, but both counts alleged, that the libel was written of and concerning the said *W. C.*, with intent to injure, prejudice, and aggrieve him in his profession of solicitor.

An indictment for a libel reflecting upon the prosecutor in his profession as a solicitor, and which has been sent to the prosecutor only, ought to be alleged to have been sent with intent to provoke and excite the prosecutor to a breach of the peace, and should not be alleged with intent to injure the prosecutor in his profession.

ABBOTT, J., when the case was about to be opened by the counsel for the prosecution, intimated that the indictment drawn in this form could not be supported; the intention on the part of the defendant in sending the letter to the prosecutor, should have been alleged, as an intention to provoke the prosecutor, and to excite him to break the peace; and that where a letter containing the libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties. It could not here be contended, that the sending this letter to the prosecutor could have the effect of disparaging him as a professional man in the eyes of the world, who knew nothing of the publication.

Topping for the prosecution, submitted, that as the objection appeared on the record, the trial should proceed; but —

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REX

v.

WEGENER.

ABBOTT, J., said, that the objection would **not** appear upon the record, since the second **count** alleged a publication generally, and that if the prosecutor proceeded on the first count, he must leave it to the jury to say, whether the defendant intended to injure the reputation of the prosecutor with the world at large, who knew nothing of the libel, the publication being confined to the prosecutor.

The defendant was acquitted.

Topping and *V. Lawes* for the prosecution.

Reader for the defendant.

NECK v. DOUGAN.

An order for the payment of prize money, under the statute 49 G. 3. c. 123. s. 13.

where the certificate required by the statute is signed in blank, by the officers of the ship on board of which

the seaman is serving, and the date is inserted at a subsequent period is irregular. And *semble*, damages cannot be recovered for the detention of such an order, by an assignee, for a valuable consideration, who describes it in the declaration, as an order for the payment of money.

THIS was an action of trover, brought by the plaintiff, to recover the value of a seaman's order for prize money.

The plaintiff was a navy agent, and the defendant was also a navy agent, and acted for the distribution of prize money to the crew of the *Lacedæmon*. The plaintiff claiming, as the assignee of an order for prize-money due to a seaman of the name of *Stevens*, had sent the order to the defendant for payment, and he now charged the

defendant

defendant with having retained this order, refusing either to return it, or to pay the amount.

In the declaration, the order was described as a certain order duly made, by one *William Stevens*, late a seaman on board His Majesty's ship *Niger*, in order to enable him to receive certain prize money. It was also described as an order for the payment of money generally.

The order purported to have been signed by two officers on board the *Niger*, according to the provisions of the statute 49 G. 3. c. 123. s. 13., and was framed according to the directions of that statute, and *Stevens's* signature was proved; and it was also in evidence, that the plaintiff had given a valuable consideration for it. The detention of the instrument by the defendant was also proved.

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DOUGAN.

Topping for the defendant contended, that it was incumbent on the plaintiff to go further, and prove, that the certificate, according to the provisions of the statute 49 G. 3. c. 123. s. 13. had been signed by the captain or commanding officer on board, and one other officer on board the ship in which *Stevens* who made the order was serving at the time when the order was made.

For the plaintiff it was contended, that this additional proof was unnecessary, since the instrument itself purported to have been signed according to the prescriptions of the statute, and had been signed by *Stevens*, who received a valuable consideration for it from the plaintiff. That as

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against a wrong-doer *primá facie* evidence of the validity of the instrument was sufficient, and that it was for the defendant to shew, that he had a good reason for detaining it.

ABBOTT, J., said, that he would save the point, in order to avoid putting the parties to expence.

The certificate at the foot of the order, purported to have been signed by *Bishop* and *Franklin*, the first as commanding officer, and the second as a commissioned officer on board the *Niger*, in which ship *Stevens* was serving as a mate, when the order in question was made. Upon examination, it turned out, that *Bishop* had been superseded by an officer of the name of *Thackstone*, at the time when the order bore date, and that if the order had been signed by *Franklin* at all, it had been signed in blank and at a different time.

Scarlett contended, that a signature in blank was sufficient; the statute did not require that the certificate should be signed at the date of the order, and if a certificate could not be signed in blank, a great inconvenience might arise, since the officers might be dispersed, and the party might not be able to get his order signed at all; —but,

ABBOTT, J. observed, that the act had made many special provisions for obviating all difficulties of that nature. The act directed, that the
last

last order made should be taken to be the valid order; but if the date could be inserted afterwards, it would be impossible to know which of two orders was valid. Such an order could not be within the meaning of the statute, and since the order was irregular, it was not such an order as was stated in the declaration, which imported a valid order.

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v.

DOUGAN.

Scarlett contended, that the plaintiff was at all events entitled to recover the paper on which the order was written; — but,

ABBOTT, J., held, that since the instrument was in every court described as an order, the plaintiff could not recover any thing.

Plaintiff nonsuited.

Scarlett and *Reader* for the plaintiff.

Topping, *Gurney*, and *Richardson* for the defendant.

See *Rex v. Moffatt*, Leach. 483. 3d Ed. *Rex v. McIntosh*, East. P. C. 965. *Rex v. Rusbaworth*, *supra*, vol. i. p. 396.

REX v. METCALF.

THIS was a *Scire Facias* brought to repeal a patent obtained by the defendant for the ma-
A brush differing from a common one in
 no other respect than in the circumstance that the hairs or bristles are purposely made of unequal lengths, is improperly described in a patent for a new invention as a tapering brush.

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v.

METCALF.

nufacture of hair brushes, which were described to be *tapering brushes*.

It appeared, from the specification, that the mode of manufacturing the patent brushes differed from the common mode, chiefly in this respect, that the specification directed, that the hairs or bristles were to be taken of the length of an inch and a quarter, and before their insertion in the holes in the stock of the brush, were to be mixed up together; so that when they were collected and drawn through the holes, and secured by a brass wire, the bristles would be of unequal lengths, whereas, according to the usual mode, the bristles were to be inserted in the stock, so as to be as nearly of the same length as possible, and were afterwards cut down, so as to be of the same length.

LORD ELLENBOROUGH. — Tapering means, gradually converging to a point. According to the specification, the bristles would be of unequal length, but there would be no tapering to a point, which the description assumes.

Scarlett for the defendant stated, that by compressing the bristles in each tuft of hairs, the effect would be, to make them converge to a point; and he suggested, that the brushes were known by this description in the trade.

LORD ELLENBOROUGH. — If the word tapering be used in its general sense, the description is defective;

defective; there is no converging to a point. If the term has had a different meaning annexed to it by the usage of trade, it may be received in its perverted sense. At present, however, I cannot hold out any prospect that the difficulty arising from the grammatical consideration can be removed.

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REX

v.

METCALF.

After some further evidence had been gone into which did not remove the difficulty, Lord *Ellenborough* advised the jury to find, that it was not a *tapering*, but only an unequal brush.

Verdict for the Crown.

Gurney and *Chitty* for the Crown.

Scarlett for the defendant.

In the ensuing term a motion was made by the defendant for a new trial, but the Court refused a rule *nisi*, upon the ground of the objection made at the trial.

THOROGOOD v. CLARKE.

THIS was an action by the indorsee against the acceptor of a bill of exchange, dated 29th of *July* 1815, drawn by *Powys* on the defendant, for the sum of 40*l.*, payable two months after with the acceptor, and gives him a receipt in full of all demands. The drawer being afterwards in possession of the dishonoured bill, an indorsee from the drawer cannot maintain an action against the acceptor.

The drawer of a bill payable to his own order, after the bill becomes due, settles

date,

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THOROGOOD

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CLARKE.

date, to the order of the drawer, and by him indorsed to the plaintiff.

Upon the evidence for the defendant, it appeared, that when the bill became due, it was in the hands of *Cripps* and Co. the bankers of *Powys*; and that on the 26th of *October*, some time after the bill had been due, *Powys* gave the defendant, after a settlement of the accounts between them, a receipt in full of all demands; and that after this, the bill was in *Powys*' hands, for several months after having been refused payment.

Peake for the plaintiff insisted, that this was not a sufficient answer, since it was not shewn that the bill had been indorsed to the plaintiff, after it became due; — but,

Lord ELLENBOROUGH held, that since *Powys*, who the 26th of *October*, gave a receipt in full of all demands, could not have sued upon the bill, which was due on the 2d of *October*, the plaintiff could derive no title from him.

Verdict for the defendant.

Peake for the plaintiff.

Gurney for the defendant.

MACBRIDE v. WOODRUFFE.

1817.

THIS was an action by the indorsee of a bill of exchange, dated *London, May* the 4th, 1817, drawn by *Henry Brian*, on the defendant, for the sum of 187*l.* 6*s.* 8*d.*, payable five months after date, to the order of the drawer. The bill was directed to *William Woodruffe, Esq., Sloane-Street, Chelsea*, and had been specially accepted by the defendant, payable at No. 32, *Castle-Street, Holborn*, and had been indorsed by the drawer to *Senate*, and by *Senate* to the plaintiff.

The first count of the declaration alleged the acceptance by the defendant, and then alleged that he then and there appointed the said sum of money in the said bill of exchange, specified to be paid at No. 32, *Castle Street, Holborn*, and afterwards alleged a promise by the defendant to pay according to the tenor and effect of his acceptance, and also alleged a presentment for payment.

The second count did not allege a special presentment, but was so defective, that it was useless.

Scarlett for the defendant insisted, that it was incumbent upon the plaintiff to prove the presentment as alleged, although the allegation itself was unnecessary, and he referred to the case of *Exon v. Russell* (a); and he contended, that since the

In an action by an indorsee against the acceptor of a bill of exchange, the declaration alleges an acceptance, and an appointment by the acceptor to pay at a particular place, and a promise to pay according to the tenor and effect of the acceptance and a special presentment; *semble*, the allegation of the presentment, may be rejected as surplusage.

(a) 4 M. & S. 505.

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WOODRUFFE

promise to pay was alleged as a promise to pay according to the acceptance, there could be no breach of the promise, without a presentment and subsequent omission to pay.

Lord ELLENBOROUGH. — At present, I am of opinion, that this is an immaterial allegation. The promise is, to pay according to the tenor and effect of the acceptance, and the acceptance being general, the allegation of presentment was unnecessary. I will take a note of the objection. (a)

The cause was afterwards referred.

Topping and *Espinasse* for the plaintiff.

Scarlett for the defendant.

(a) In the case of *Exon v. Russel*, 4 M. & S. 505. the promissory note was alleged to have been made payable at a particular place, when in fact, the note was not so payable, the address at the foot of the note being a mere memorandum. And the Court held, that the variance was fatal. That objection does not apply to in the above case, since in fact, the defendant did appoint the sum to be paid at a particular place. The subsequent promise to pay according to the tenor and effect of the acceptance, does not seem to amount to more than a promise to pay, according to the legal effect of

the acceptance as previously stated, and in legal effect, it was a general acceptance. The allegation therefore of a special presentment, seems to be mere surplusage; it amounted to no misdescription of the bill itself, and was not rendered necessary by the previous allegation of the defendant's acceptance of the bill, for according to that allegation, the place of payment was no part of the original bill, but a mere direction for the convenience of the acceptor, according to the cases of *Saunderson v. Judge*, 2 H. B. 509. *Fenton v. Gounday*, 13 East, 459. *Saunderson v. Bowes*, 14 East, 500.

MUNN v. BAKER and Another.

1817.

THIS was an action against the defendants for negligence as carriers, in losing a parcel.

A carrier who gives two notices, limiting his responsibility, is bound by that which is least beneficial to himself.

It appeared, that large printed notices had been stuck up in the defendants' counting-house and warehouse at the wharf, announcing that the proprietors would not be accountable for any article, unless entered in the books by the book-keeper, who should give a receipt to the porter or other person entrusted with the delivery of the goods at the warehouse, which receipt should be deemed such a general acceptance of the goods as in case of loss, should subject the proprietor to pay 5*l.* if the goods weighed more than twenty-eight pounds, and if less than twenty-eight pounds to twenty-five shillings, and not more, &c. It was also proposed, to prove that a similar notice of limitation had been published in the *Gazette* ; but —

LORD ELLENBOROUGH was of opinion, that this evidence could not be received, without proof of the plaintiff's having read the *Gazette* ; since he might be expected to look into the *Gazette* for notices of the dissolution of partnerships, but not for notices by carriers, of the limitation of their responsibility.

It appeared, that when the goods were delivered, a small paper containing a notice without any such limitation, as was contained in the large one, had

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MUNN

v.

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and Another.

had been given to the person who delivered the parcel; and —

Lord ELLENBOROUGH was of opinion, that by the delivery of a notice without the limitation, the defendants had nullified the notice which contained the limitation; having given two notices, they were bound by that which was least beneficial to themselves.

Verdict for the plaintiff for the full amount.

Topping and Merewether for the plaintiff.

Marryatt for the defendants.

SPAIN v. ARNOTT.

If a servant hired for a year refuse to obey his master's orders, the master is justified in dismissing him before the end of the year, and the servant cannot recover any wages.

THIS was an action brought by the plaintiff to recover wages for his service from *Michaelmas* to *July*.

The plaintiff was a yearly servant to the defendant who was a farmer. The plaintiff usually breakfasted at five o'clock in the morning, and dined at two. One day the master ordered the servant to go with the horses to the *Marsh* which was a mile off before dinner, dinner being then ready. The plaintiff said, that he had done his due, and would not go till he had had his dinner; the defendant told him to go about his business, and the plaintiff went

went accordingly, without offering any submission, or to obey his master's orders.

On the part of the defendant, it was contended, that the action was not maintainable, since the contract was a year's service in husbandry, which had not been performed.

1817.

SPAIN

v.

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Scarlett, for the plaintiff, contended, that if the master had had any reason to complain of the conduct of the servant, he ought to have complained to a magistrate for relief. That the master could not by turning the servant away before the completion of the year dissolve the contract and bereave him of his wages; it would be exceedingly hard if he could, for then, he might put an end to the contract on the very last day.

LORD ELLENBOROUGH. — If the contract be for a year's service, the year must be completed, before the servant is entitled to be paid.

If the plaintiff persisted in refusing to obey his master's orders, I think he was warranted in turning him away. He might have obtained relief by applying to a magistrate; but he was not bound to pursue that course, the relation between master and servant, and the laws by which that relation is regulated, existed long before the statute. There is no contract between the parties, except that which the law makes for them, and it may be hard upon the servant, but it would be exceedingly inconvenient if the servant were to be permitted

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mitted to set himself up to control his master in his domestic regulations, such as the time of dinner. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year. In the present instance it might be very inconvenient for the master to change the hour of dinner; the question really comes to this, whether the master or the servant is to have the superior authority.

A juror was afterwards withdrawn by consent.

Scarlett and *E. Lawes* for the plaintiff.

Bolland for the defendant.

Tuesday,
Jan. 13.

BERTHON and Another v. LOUGHMAN.

The opinion of one conversant in the business of insurance, as a matter of judgment, whether the communication of particular facts would have enhanced the premium is admissible evidence; but he cannot be asked what he

THIS was an action on a policy of insurance, on two-thirds of the vessel, *Madre de Dios* valued at 2000*l.*, and upon goods valued at 1500*l.* from *Pernambuco* to *St. Michael's*.

The vessel had sailed from *St. Michael's* on her outward voyage in *May*, 1811, and there was evidence to shew the probability that *Vasconcellos*, the owner, who resided at *St. Michael's*, knew that the ship had sailed from *Pernambuco* on her homeward voyage on the 3d of *September*, 1811. The loss took place

himself would have done in the particular case.

on

on the 5th of *September*. The letter containing the instructions to effect the insurance, was dated *December* 12th, 1812, arrived in *London* on the 29th of *January*, and the insurance was effected on the 3d of *March*.

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The defence was, that the ship at the time when the directions were given for the insurance, was to be considered as a missing ship, and that information material for the guidance of the insurer had been withheld, the insurance having been effected as upon an ordinary risk. The letter, upon the ground of which the insurance had been effected, having been put into the hands of a witness for the defendant, who was conversant with the subject of insurance, he was asked whether the knowledge of the facts above stated, would not have made a difference as to the terms of the insurance. The question was objected to.

HOLROYD, J.—Whether particular facts, if disclosed to an underwriter would, in the opinion of the witness as a matter of judgment, make a difference as to the amount of the premium, is, I think, admissible evidence. The premium has all along been considered as calculated upon an ordinary risk, and the question is not what the private opinion of the individual may be, as to the probable course of his conduct in a particular case, but what in his judgment the general opinion would be amongst those conversant with such matters. Whether the jury do or do not possess any knowledge or information on the subject, can

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make no difference as to the reception of the evidence.

The plaintiff afterwards had a verdict.

Topping, Scarlett, and Richardson, for the plaintiff.

Marryatt, Gurney, and Campbell, for the defendant.

COHEN v. TEMPLAR and Another.

A person who is interested in a commission of bankruptcy and the proceedings under it, is entitled to have them produced in a collateral cause.

THIS was an action of special assumpsit.

The gist of the complaint against the defendants was, that the plaintiff having obtained judgment against one *Jones* for a debt of 1180*l.*, and he having been declared a bankrupt, the plaintiff employed the defendants to petition the Lord Chancellor to permit the plaintiff to prove under the commission, and that the Chancellor had directed an issue to try whether the plaintiff was a creditor or not, and that the defendants, instead of acting upon this order, had taken *Jones* in execution, in consequence of which the petition was fruitless.

Mr. Knight, the solicitor to the assignees under the commission against *Jones*, having been subpoenaed to produce the commission, submitted it to the Court, whether the assignees were bound to produce the proceedings.

Topping

Topping contended that they were, since the plaintiff had an interest in the commission, and —

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HOLROYD, J., was of opinion that the proceedings ought to be produced.

The plaintiff afterwards offered to give secondary evidence of the petition to the Lord Chancellor; but being unable to prove that any search had been made for the original, the plaintiff was nonsuited.

Topping and Chitty for the plaintiff.

Scarlett and Gurney for the defendants.

CROWLEY v. IMPEY and Others.

THIS was an action for an assault and false imprisonment against the three defendants, who were commissioners under a commission of bankrupt against the plaintiff.

Commissioners of bankrupt make a warrant for the commitment of a bankrupt for refusing to be examined, the bankrupt being already confined in the King's-bench under previous process, (semble) the

The action was brought in order to try the validity of the commission. The plaintiff had been committed under a warrant from the commissioners for not passing his examination on the 18th of *June*, 1816. But it appeared that he had been in custody in the *King's-Bench* prison, from the 16th of *April*

issuing of the warrant by the commissioners does not amount to an imprisonment by them, till the warrant is in some way operative to the detention of the party independently of the other process. But if the warrant operate to the confinement of the party within narrower bounds, it is an imprisonment by the commissioners.

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preceding, under process of contempt and upon an action ; and that the processes were still in force at the time of the commitment under the warrant. The warrant was produced by the Marshal's clerk as a subsisting warrant.

Scarlett for the defendants, contended, that this was not evidence of any trespass or imprisonment by the defendants, since the plaintiff was in custody under other process, and could not be considered as in custody under the warrant until it had operated in some way or other to his imprisonment.

Gurney for the plaintiff insisted that this was an imprisonment, the directions of the warrant were that the plaintiff should be kept without bail until he should submit himself to the commissioners. This therefore was an imprisonment on the part of those who ordered him to be kept without bail, and who imposed double fetters upon him.

LORD ELLENBOROUGH was inclined to think, that the making the warrant which might have operated to the imprisonment of the plaintiff, did not in itself, and previous to any actual operation constitute an imprisonment, it was an order for imprisonment rather than an imprisonment.

It afterwards appeared, that previous to the warrant, the plaintiff had had the benefit of the rules ; but that subsequently, in consequence of the
warrant,

warrant, he had been confined within the walls of the prison.

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LORD ELLENBOROUGH was of opinion, that the confinement of the plaintiff, within narrower bounds, constituted an imprisonment.

The plaintiff was afterwards nonsuited upon the merits.

Gurney and Taddy for the plaintiff.

Scarlett and Richardson for the defendants.

BECKWITH v. WOOD and Another.

THIS was an action by the plaintiff to recover a compensation against the inhabitants of the *City of London*, under the statute 1 G. 1. st. 2. c. 5. for the injury done to his house and property by the *Spa-Fields* mob, on the 2d of *December*, 1816.

The plaintiff was a gunsmith in *Skinner-Street*, and on the 2d of *December*, a young man entered the plaintiff's shop and called out for arms. Mr. *Platt*, put his hands on each of the young man's shoulders and remonstrated with him, when the young man fired a pistol, by which Mr. *Platt* was wounded in the belly, and the young man was taken into custody. Five or six men who were to his remedy against the hundred, under the st. 1 G. 1. st. 2. c. 5. ——— Damages may be recovered in respect of guns found in the house, and used and damaged in the course of demolition. ——— But not in respect of guns stolen by the mob.

If a mob attack a house with intent to liberate a person in custody in that house, or to pull the house down in case he be not delivered up, and proceed to acts of violence, this is a sufficient beginning to demolish, as far as intention goes, to entitle the owner

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following the young man, on hearing the pistol fired decamped. A mob of five or six hundred persons who had passed the plaintiff's house about twenty yards, afterwards returned, saying "this is the house, we will have him out." The plaintiff's foreman informed the mob that the young man was gone, upon which they went off, crying "to *Tower Hill*." The young man then shewed his head out of a window up three pair of stairs in the plaintiff's house, and the mob saw him and cried out "there he is, we'll have him out or pull down the bloody house." A brewer's servant then thrust a broom-stick through the window, and the mob drawing the guns through the window began to demolish the windows and window-frames with the butt ends of the guns, and forcing their way into the house, they began to demolish the glass presses in which the guns were kept with the butt ends of the guns, and took the guns out by ten or twelve at a time, and distributed them to the mob on the outside, saying, "here are arms my boys." In breaking the window frames and presses some of the guns were broken. They then went to the powder cupboard and emptied it. Many bags of shot were also taken, and part of the shot was strewn upon the floor. The window frames were all broken and demolished. The whole amount of the damage was upwards of 1221*l*.

Knowlys for the defendants objected, that the plaintiff was not entitled to recover. There was no intention on the part of the mob to demolish the

the house; their leader demanded arms, and when he was in custody, their intention was to release him and not to demolish the house. The case therefore was not within the riot act. And he cited the case of *Reid v. Clarke* (a), and *Lord King v. Chambers* (b). The taking the goods out of the shop, was (he contended) a substantive felony, unconnected with the demolition, and he cited the case of *Greasly v. Higginbotham* (c), where it was held, that where a mob after beginning to demolish and pull down a house, stole flour contained in the house, or forced the owner to sell it at an under price, the value could not be recovered against the hundred, also the case of *Smith v. Bolton*, tried before *Le Blanc*, J., at the *York Spring Assizes*, 1816, who held, that the hundred was liable only for the furniture and other articles actually demolished by the mob, and not for such as were stolen and carried off. (d)

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LORD ELLENBOROUGH. — I was counsel in the case of *Reid v. Clarke*, which was decided on the ground that the mob having it in their power to demolish the house, went away without proceeding to demolish it, and therefore, that there was no beginning to demolish it. The question here is, what was the purpose of the mob, and whether, if they could not have rescued their leader, they would not have proceeded to demolish the house, whether they

(a) 7 T. R. 496.

(b) See vol. i. p. 195.

(c) 1 East, 636.

(d) See vol. i. p. 195. in the notes.

would

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would not have proceeded to demolish the house, as they threatened, unless his escape had intervened. It is a principle of law, that a person intends to do that which is the natural effect of what he does. If therefore the pulling down the house was intended as a means of getting at him, they intended to demolish the house. It will be proper before the case goes to the jury, to have it ascertained what number of guns was taken and not destroyed. If the disappearance and damaging of the property was the consequence of the demolishing, I think the value may be recovered, the distinction is between the damage occasioned by the demolishing and the substantive act of stealing, to which the demolition of the house is not auxiliary.

On the part of the defendants, an examined copy of the record was afterwards given in evidence, in order to shew that several persons had been tried, and one convicted of stealing some of the guns ; and it was attempted to shew, that the prosecutions against these persons had been directed by the plaintiff.

LORD ELLENBOROUGH. — I do not see how this evidence can affect the case. A person choosing to prosecute for a particular offence, cannot fix the character of that offence as against other parties. This record is evidence, to shew a prosecution for a felony arising out of this transaction ; but it does not follow, that each substantive felony did not exist.

exist. The prosecution for one offence is not unfrequently crossed by evidence of another. Upon a trial for burglary, for instance, it may appear, that the crime of murder has been committed. The complication of crimes does not destroy the several nature of each. This evidence leaves the case exactly where it stood before.

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In summing up to the jury, his lordship observed, The reason why an action was given by the statute, was that the offence being made felony, the person injured could no longer bring his action for a trespass, and therefore his remedy would have been lost. In order to prevent this, the statute transferred the remedy, and enabled the party to recover damages against the inhabitants of the district, who were to be responsible for the conduct of the individuals within it. In order to maintain the action, it is essential in the first place, that there should have been an intention on the part of the mob to demolish the house; and if you are of opinion that there was such an intention, there has been in fact a sufficient beginning to demolish.

It appears that a young man came to the shop with five or six hundred others, and their primary object then certainly was to procure arms. He demanded arms, and after wounding Mr. *Platt* he was taken into custody, they then clamoured for his delivery, crying, "pull down the house, we will have him out." Now what were the means first used? They broke the windows and frames, and having proceeded thus far, they take out weapons,
 and

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and use guns as instruments to effect their purpose, which was to get the young man out of custody, or if they could not to pull down the house, as a penalty on the person who kept him back. If you are of opinion, that the guns which were damaged were used for the purpose of destruction, although but conditionally, in case the man should not be given up, this was a beginning to demolish. The principal item of damage, consists of those guns which were taken away. Those who took them away were guilty of a crime for which they were liable to be prosecuted, and some have been prosecuted; and upon the conviction which has taken place, there can be no imputation. The question is, for what purpose those guns were taken out, was it in order to steal them or to distribute them amongst the mob for purposes of similar violence? Were they taken in order to effect the common purpose, either to release the person in custody or to pull down the house? If the latter was the object (*a*), I think the case falls within the

(*a*) In the ensuing term, *Knowllys* C. S., moved for a new trial, on the ground, that there was not sufficient evidence, of an intention on the part of the mob to demolish the house, but the Court refused a rule *nisi* upon that ground. He then moved to reduce the damages, by excluding the value of the property which had been taken away during the transaction; and it was agreed, that the question should be argued upon a special case reserved. The case was argued in the ensuing *Easter* term, when the Court held, that the plaintiff was not entitled

to recover, in respect of the arms which had been taken away during the attempt to demolish the house. The legislature gave the action against the hundred, in order that the party who before the st. 1 G. 1. st. 2. c. 1. had a remedy against the party who attacked his house, might not be deprived of that remedy by the statute which made the offence felony, and consequently deprived him of his civil remedy against the offender. But he never had a civil remedy against those who stole his goods, and consequently the statute did not extend to that case.

prin-

principle already laid down. If you are of opinion, that this was done with a view to obtain possession of the man in custody, and unless he should be given up to pull down the house, I think the plaintiff is entitled to recover with respect to this item of damage.

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The jury found that the whole was done with intent to demolish, and consequently the plaintiff had a verdict for the whole of his demand.

Gurney and *Bolland* for the plaintiff.

Knowlys, C. S., and *Tindal* for the defendants.

REA. v. WOOD and Another.

THIS was a similar action brought by the plaintiff, who was a gunsmith in the *Minories*. The declaration alleged a beginning to demolish the dwelling house of the plaintiff.

It appeared that the father of the plaintiff had a lease of the house, which would expire in the year 1820, and that the plaintiff was entitled to the residue of the term under the will of his father. The plaintiff occupied the shop and the back parlour, but no part of his family slept there, the remainder of the house was occupied by lodgers.

A house, part of which is occupied by the plaintiff as a shop and the remainder of which is occupied by lodgers, no part of his family sleeping therein, is a dwelling-house, within the protection of the stat. 1 G. 1. st. 2. c. 5.

Knowlys for the defendants objected that this was not a dwelling-house within the words of the statute

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statute 1 *G. 1. st. 2. c. 5. viz.* Any church or chapel or any building for religious worship certified or registered according to the statute made in the first year of the reign of the late King *William* and Queen *Mary*, &c. &c. Any dwelling-house, barn, stable or other outhouse. This was either no dwelling-house at all, or the dwelling-house of some other person, and therefore improperly laid in the declaration to be the dwelling-house of the plaintiff. This had been frequently held in cases similar to this upon indictments for burglary. If the part occupied by the plaintiff was to be considered as entirely distinct from that occupied by the lodgers, it was the dwelling-house of no one; if it was not distinct from the part occupied by a lodger, then it was to be considered as the dwelling-house of that lodger. If the plaintiff, or any of his family or servants, had slept in the part occupied by the plaintiff, it would have been his dwelling-house, but this was not the case. If the premises could not be considered to be the dwelling-house of the plaintiff for one purpose, they could not for any other. He also contended that there was not sufficient evidence of an intention on the part of the mob to demolish.

Gurney for the plaintiff contended that the term "dwelling-house" used in the statute was merely meant to ascertain the description of building which was intended to be protected by the legislature.

Lord

Lord ELLENBOROUGH upon the first objection intimated that he should allow the plaintiff to recover if the jury thought he was entitled to a remedy in other respects, but that he would save the point for the plaintiff. And he left it to the jury to say whether in fact there was a beginning to demolish, observing, that in the other case, which had been tried by them, it appeared that there was a declared purpose of pulling down the house. In the present case there was nothing from which the intention could be inferred, except the act itself. But there had been a wanton demolition not reconcileable with the mere intention to procure possession of the guns, and therefore it was for the jury to consider whether the mob came with intent to steal the arms, or to use them in the execution of an intention to demolish the house.

The jury found for the plaintiff.

Gurney and *Bolland* for the plaintiff.

Knowlys, C. S., and *Tindal* for the defendants.

In the ensuing term *Knowlys*, C. S., moved for a new trial, upon the objection which he had urged at the trial, but the Court held that the term dwelling-house was used in the statute as a word of general description of the kind of property intended to be protected, and refused the rule. A rule *nisi* was granted, upon the question whether the plaintiffs were entitled to recover the amount of

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of the guns which were taken out of the shop during the attempt to demolish. (a)

(a) See the note to the last case.

Tuesday,
 Jan. 16.

BURN and Another Assignees of BONE v.
 BROWN and Another.

A factor for the owner of a ship at an English port requests the master to deliver the certificate of registry to him, in order that he may pay the tonnage duties at the Custom-house. He cannot, having thus obtained possession of the certificate, retain it as a security for the general balance due to him as factor, in respect of the ship.

THIS was an action brought by the plaintiffs as the assignees of *Bone*, a bankrupt, against the defendants, for withholding the certificate of the registry of the ship *George and Mary*, of which *Bone* was part owner.

The defendants had been the factors for *Bone* at *Shields* for several years ; whilst the *George and Mary* was at *Shields*, the master of the ship placed the certificate of the ship's register in the hands of the defendants, at their request, in order that the latter might pay the duties at the Custom-house, which they accordingly paid, but they afterwards detained the certificate, insisting that they were entitled to a lien upon it for the whole of the balance due from *Bone* to them, amounting to upwards of 900*l*. The master of the ship was not informed when he delivered the certificate to them at their request, that they had any intention to detain it till the whole of their demand was paid, and said that if he had known that he would have paid the duties himself.

It was contended on the part of the defendant first, that they had a right to detain the certificate

as a security for the whole of the balance due, since it came into their hands in the usual course of business without fraud. It was the business of the factor to pay the tonnage duties at the custom-house, and this could not be done without the production of the certificate of Registry. Secondly, that they had at all events a right to detain it in respect of the tonnage duties then paid.

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Another.

BAYLEY, J. — The defendants were not entitled to withhold the certificate of registry, for two reasons. 1st. Because they had no right to the possession of it for the purpose of a lien in the first instance ; and 2dly, because they claimed to retain it for too large a sum. The captain was told that it was wanted, in order that the defendants might proceed to pay the duties at the Custom-house, and not with a view to a lien, and therefore they cannot insist upon detaining it for that purpose. If he had been told that the defendant's object in obtaining it, was to produce it at the Custom-house, and to hold it for a debt due from the owner, he would not have parted with it, he would have gone to the Custom-house, and would have paid the duties himself. I will save the point for you ; but I entertain no doubt upon it.

Verdict for the plaintiff.

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Assignees of MEYER v. SEFTON and Others.

Upon the question whether A., after executing a conveyance of property to trustees for the benefit of his wife, had the disposition of the property, evidence of his making an assignment of it, is not admissible against the trustees, unless they were privy to it, or unless the property was delivered, and the assignment acted upon.

Semble, a letter written by an attorney to his client, and produced with the client's signature indorsed upon it, is evidence against the client.

THIS was an issue to try whether *Meyer*, who had been declared a bankrupt, had duly executed a certain deed of settlement, under which the defendants claimed certain property, as the assignees of Mrs. *Meyer*; and also whether *Meyer* had the disposition of the property afterwards.

It was proposed on the part of the plaintiffs to shew, that after the date of the deed, *Meyer* had proposed to execute an assignment of their property.

Topping for the defendants objected, that this was not evidence, since it amounted to nothing more than what had been said by *Meyer* after the execution of the deed in question, as to executing some other deed.

Scarlett contended, that it was evidence, as shewing the unbounded dominion which *Meyer* exercised over the property.

HOLROYD, J. — Any act of dominion which *Meyer* exercised over the property, would be evidence, although the trustees were not privy to it; but an assignment made behind the backs of the

Where the question is as to the solvency of a party at a particular time, the general result as collected from sufficient sources may be given in evidence. — And *semble*, the accounts rendered by a bankrupt of his affairs to the commissioners are competent sources.

trustees, and without the knowledge of Mrs. *Meyer*, is not evidence, unless it be acted upon and possession be delivered.

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It was afterwards proposed, on the part of the plaintiffs, to read a letter, written by the solicitor, who had prepared the deed in question, to *Meyer*, and which had been found amongst the papers of *Meyer*, after he had become a bankrupt, with his hand-writing indorsed upon it.

Topping objected, that this could not be read, since it was a letter written in confidence, by the attorney to his client; and at all events was not evidence against the trustees, even if it were evidence against *Meyer* himself.

Scarlett contended, that the usual rule that the attorney cannot reveal confidential communications made by his client, did not at all affect this case; it was no breach of confidence to read the letter of the attorney, found in the possession of the client: his own letter might have been read.

It afterwards appeared, that the letter had been written before the execution of the deed in question, and related to the subject of the execution of the deed; and *HOLROYD, J.* admitted it to be read.

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Evidence was afterwards adduced, to shew the value of the property ; and a witness was produced on the part of the plaintiffs, who had examined the accounts and books of the bankrupt, and it was proposed to examine him as to the result, as a means of ascertaining what the value of the property in question was. This was objected to on the part of the defendants.

HOLROYD, J., was of opinion that the evidence was admissible ; such evidence had been admitted in a case before Lord *Kenyon*, after it had been objected to, where the question was as to the solvency of a party at a particular time. From the very nature of the case, such an inquiry could not be made in court, and therefore evidence on such a point must be given by some one who had had the means of inquiry, and who could state the result. With respect to the source from which the knowledge of the witness was drawn, in the present instance, a commission of bankrupt had issued, and the documents from which the result was obtained, had been rendered by the bankrupt. He had been obliged to render up his accounts, with a view to the state of his affairs, under the severest penalties ; and therefore the result was admissible.

It appeared afterwards, that the witness had no means of estimating the value of some of the items essential to the calculation ; and the evidence was withdrawn.

The

The jury afterwards found for the plaintiffs on both issues.

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and Others.

Scarlett, Gurney, and Gaselee for the plaintiffs.

Topping, Marryatt, and Taddy for the defendants.

ADAMS v. FAIRBAIN.

Monday,
December 22.

THIS was an action brought to recover a deposit of 39*l.* upon the purchase of a lease of the *Bricklayers Arms* public house, by the plaintiff at a public auction. The plaintiff had declared on a special agreement, and also for money had and received.

Declaration on a special agreement for the sale of a lease of a house in order to recover a deposit for the purchase, the supposed agreement being unstamped, but not having been signed by either of the parties, or by the auctioneer as their agent, the plaintiff may recover for money had and received.

Upon the production of the supposed agreement, it appeared to be unstamped; but it had not been signed by either of the parties, or by the auctioneer as their agent.

ABBOTT, J., was of opinion, that the plaintiff might still be entitled to recover on the money counts.

In such case it is incumbent on the defendant to shew that when the

It afterwards appeared, that in order to complete the title, it was necessary to procure the execution of an assignment of the lease by one *Allen*,

deposit was demanded by the plaintiff, he tendered an assignment of the lease

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and that the lease itself was in the hands of the brewer, who had supplied the former tenant with liquor, and who had a lien upon it for the amount of his debt, but that he was willing to give it up on being paid the debt.

ABBOTT, J., having intimated that it was incumbent on the defendant to shew that an assignment of the lease executed by *Allen*, had been tendered to the plaintiff when he demanded his money.

Marryatt for the defendant submitted, that since the money had been paid on ground of a contract between the parties, it could not be recovered whilst the contract was in force, and until default made by the defendant; he was ready to prove that the parties were on the spot ready to assign the lease, on the payment of the remainder of the purchase money by the plaintiff, and he contended that the payment of the money, and the assignment of the lease were concurrent acts, and that neither of the parties was bound to execute his act the first; it was sufficient if each of them was ready to perform his own part of the engagement.

It appeared in evidence that the parties had met in order finally to conclude the business, and that the plaintiff's attorney attended to pay the remainder of the purchase-money: it also appeared, that *Allen*, at the request of *Fairbain*, had attended

tended in town for the purpose of executing the assignment, but that, in fact, no assignment had been either tendered or executed.

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ABBOTT, J., was of opinion, that it was incumbent on the defendant to prove that an assignment had been executed. There was no contract between the parties in evidence, since the statute of frauds required that such a contract should be in writing, and since no assignment appeared to have been tendered, his Lordship directed the jury to find a verdict for the plaintiff, and the jury found accordingly.

Topping and Dehany for the plaintiff.

Marryatt for the defendant.

DAVIS v. WILLAN and Others.

THIS was an action against the defendants as the proprietors of a mail coach, for the negligent carriage of money, bills, and notes, from *Stamford* to *London*, in consequence of which they were lost.

The defendants relied upon two grounds of defence; first, that the parcel which had been delivered to the defendants to be carried, did not, in fact, contain the valuables alleged to have been lost; and secondly, that sufficient notice had been given

A carrier, in order to avail himself of a notice limiting his responsibility, must bring notice of his intention home to the mind of the party.

A notice stuck up in the office is insufficient, where the party cannot read.

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and Others.

by the defendants of their intention to limit their responsibility as carriers.

ABBOTT, J., after having explained to the jury the necessity of a special contract to be proved on the part of the defendants, in order to relieve themselves from their responsibility at common law, observed, in order to avail themselves of such a limitation, it is essential that they should bring the knowledge of it plainly and clearly to the mind of the party who deals with them, that they intend so to limit their liability. In order to do this, it has been the most usual course to put up a notice in the office ; but it may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means ; the book-keeper may inform him. In this case, notice was stuck up in the office, but it seems that it gave no information to the party, since he was not able to read ; and I think that notice has not been sufficiently brought home to the knowledge of the party. (a)

The defendants had a verdict.

Marryatt and *Platt* for the plaintiff.

Scarlett for the defendant.

(a) See the case of *Kerr v. Willan*, vol. ii. p. 53.

MAUNDER and Another v. CONYERS.

1817.

Dec. 23.

THIS was an action against Mr. *Conyers* for the amount of a quantity of brandy alleged to have been sold and delivered to him.

It appeared in evidence that the brandy had been ordered by the butler of Mr. *Conyers*, in the name of the latter, and that it had been delivered accordingly, and had been consumed by the butler and the cook; and that the defendant had not been privy to the order, delivery, or consumption.

A master is not responsible for liquors ordered by his butler in the name of the master, but without his authority, unless he has on former occasions paid for goods ordered by him, or there is some other evidence, to shew that the butler had authority for what he did.

LORD ELLENBOROUGH. — If the defendant had been in the habit of paying for goods ordered by his butler, he would be bound: but we must give up housekeeping if such evidence as this were sufficient to bind a master.

Verdict for the defendant.

WALKER v. DIXON.

THIS was an action to recover the value of eight sacks of flour, alleged to have been sold and delivered to the defendant. Plea, *non assumpsit*.

part, recover for that part, the defendant being willing to receive and pay for the whole.

One who has agreed for the sale of 100 sacks of flour, cannot, after the delivery of

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N. It appeared that the plaintiff had contracted for the sale of 100 sacks of warranted flour to the defendant, at 94s. 6d. *per* sack; ten sacks to be sent immediately on trial; to be accepted or rejected in two days from the sending the ten sacks. Ten sacks had accordingly been sent, of which the defendant retained four, sending six back, because they were of secondary quality, and desiring that the error might be rectified. Ten other sacks had afterwards been sent by the defendant to the wharf of *Raymond* and *Storey*, these were approved of by the plaintiff, and he took two of them, leaving the remainder at the wharf, to await his further orders, and these were afterwards taken away by the plaintiff, who refused afterwards to complete his engagement for the 100 sacks. The defendant afterwards insisted upon his delivering the remainder of the flour, and tendered him the whole amount, giving him notice that if he did not deliver the rest he would purchase the same quantity elsewhere, and charge him with the difference.

It was contended, on the part of the defendant, under these circumstances, that since the contract was entire the plaintiff could not split it into parts, and bring his action for part of the flour, and thereby substitute a different contract from that contemplated by the parties.

Topping for the plaintiff contended, that the refusal on the part of the plaintiff to deliver the whole

whole of the flour was the proper subject of a cross action; and that the tender was not available to the defendant, since it had not been pleaded.

1817.

WALKER
v.
DIXON.

LORD ELLENBOROUGH. — This is the case of an entire contract for 100 sacks, part of these were delivered, to which objection might have been made as to quality, but the party did not stand upon that objection, but offered to pay the whole. And since the defendant was ready to perform the contract, and to pay for the whole at the price agreed upon, including the four sacks which were objected to, I am of opinion that the plaintiff could not afterwards split the contract, and bring his action for part only. If the defendant had insisted upon an abatement being made in respect of the first four, I might have thought differently.

Plaintiff nonsuited.

Topping and Comyn for the plaintiff.

Scarlett and Wilde for the defendant.

See *Waddington v. Oliver*, 2 N. R. 61.

1817.

EDINBURGH v. CRUDELL.

Upon the trial of an issue whether the date of an annuity deed has not been altered, the attesting witness must be called.

THIS was an issue out of Chancery, to try whether an annuity deed was executed by the plaintiff, *Garrard Edinburgh*, on the 7th of *April*, 1808, and whether an alteration had been made in the date from the 7th to the 8th of *April*. And also whether a memorial of the deed had been duly enrolled within twenty days after the execution of the deed.

Marryatt for the defendant objected, that the deed itself could not be read without calling the attesting witness.

Scarlett. — If the question were as to the existence of the deed, the attesting witness must no doubt be called to prove it: but here the very issue assumes the existence of the deed.

LORD ELLENBOROUGH. — The question is as to the date upon the deed, and the attesting witness is a most material witness for this purpose. The plaintiff would not be concluded by what he said from proving the contrary. That was done in the case of *Mr. Jolliffe's* will, where all the subscribing witnesses were called.

Longstaffe,

Longstaffe, the subscribing witness, being then called on his subpoena, did not appear.

1817.

EDINBURGH

v.

CRUELLE.

Scarlett submitted, that if he had been there he could not have been examined, since he must have been called upon to criminate himself.

LORD ELLENBOROUGH. — It is unfortunate, but I feel that the objection is insuperable. Means may be taken to insure his attendance at another time.

It was then suggested that the proof of the second issue lay upon the defendant. On advert-
ing to the terms of the issue it appeared that the plaintiff alleged that the time of inrolment was more than twenty days after the execution of the deed.

LORD ELLENBOROUGH. — Then he has taken the *onus* of proof upon himself.

Plaintiff nonsuited.

Scarlett and *Chitty* for the plaintiff.

Marryatt for the defendant.

1817.

GIBBON and Others v. SCOTT.

The payee of a bill of exchange accepted as a security for A., engages to renew it for three months more, if A. be not returned before the bill become due. If the acceptor after the expiration of that time make no application for a renewal of the bill, the payee may bring his action before the expiration of three months more.

THIS was an action on a bill of exchange for 1000*l.*, drawn by the plaintiffs upon, and accepted by the defendant, payable five months after date, for value received on account of the ship *Dawson's* freight.

The bill had been given by the defendant as a security for the freight of the ship *Dawson*, which had been chartered by *Sindrey*.

The defendant relied upon an engagement by the plaintiffs to renew the bill for three months if *Sindrey* were not returned when the bill became due; but it appeared that no application had been made to the plaintiffs to renew the bill; — and

LORD ELLENBOROUGH held, that the plaintiffs were entitled to a verdict.

Campbell for the plaintiffs.

Taddy for the defendant.

DORE v. WILKINSON and SPURVEY.

1817.

THIS was an action of trover, for converting books of account belonging to the plaintiff.

Proof having been given of the entry of the defendants upon premises, occupied by the plaintiff as a brewer, evidence was offered on the part of the defendants, with a view to prove that the defendants were partners with one *Mitchell*, and that *Mitchell* had in fraud of the defendants given up possession of the premises to the plaintiff, and it was contended, that inasmuch as the books related to the business of the concern in which the defendants were partners with *Mitchell*, they had an interest in the books. But it appeared that the books had been purchased by the plaintiff with his own money, and that the accounts which they contained, related to transactions posterior to his entry.

One of several partners, as brewers, transfers the premises to A., who buys books and carries on the same business there; the other partners are not entitled to the possession of these books, the contents of which do not relate to any entries anterior to A's entry.

Lord ELLENBOROUGH was of opinion, that even supposing that the partnership existed, as was contended for, it would give the defendants no right to the possession of the books; the plaintiff had a special property in them since they were bought with his money, and the entries related to matters all subsequent to his entrance upon the premises, and therefore they had neither *jus in re* nor *jus ad rem*. And even supposing him to be the mere agent of *Mitchell*, he had a lien on the books, in respect

1817.

DORE

v.

WILKINSON
and SPUREY.

respect of the sum expended upon them, and no one could take them away till that sum had been paid. And since there had been no offer to pay the value, the plaintiff was entitled to a verdict.

Verdict accordingly.

Scarlett for the plaintiff.

Gurney and *West* for the defendants.

In the course of this trial, Lord ELLENBOROUGH intimated that the bringing an action of trover was not the most convenient remedy in a case of this nature, and said that he had heard Mr. *Wallace* express his surprise that the remedy by replevin was not more frequently resorted to, by means of which the party might obtain possession of the specific chattel of which he had been deprived, instead of an action of trover, in which he would recover damages only.

WALSH v. TYLER.

A. the drawer of a bill of exchange, payable to his own order, being indebted to B. on another bill, for which he is bound to provide, indorses the first bill to B. to enable him to raise money upon it, in order to take up the second bill, this is an available security in the hands of B. in reduction of his demand on A. and he may recover upon it against the acceptor.

THIS was an action by the plaintiff, as the indorsee of a bill of exchange, dated *March 18th 1817*, for the sum of 50*l.* payable three months

after

after date, drawn by *J. Shaw* upon the defendant *Bridget Tyler*, payable to the order of the drawer and by him indorsed to the plaintiff.

1817.
 WALSH
 v.
 TYLER.

It appeared that *Shaw* the drawer of the bill having to take up a bill of *Walsh's* for 77*l.* 10*s.* sent the bill in question down to *Walsh*, in the country, in order that he might get it discounted, and that *Walsh* having received the bill, wrote to *Shaw*, to say that if he could get cash for the 50*l.* bill, he would send it up, and also some goods to enable *Shaw* to take up the other bill. A commission of bankrupt had afterwards been taken out against *Shaw*, when *Walsh* attempted to prove his debt against him for 77*l.* 10*s.*, and admitted that he held the 50*l.* bill as a security against *Shaw*.

On the part of the defendant it was contended, that the plaintiff could not recover, being a mere trustee for *Shaw*, to get the bill discounted.

LORD ELLENBOROUGH was of opinion that the plaintiff was entitled to recover, it was clear that a person who held a bill as trustee for another for a specific purpose, could not recover on the bill in contravention of the trust; but here the plaintiff was a trustee for himself; the bill had been sent with reference to the debt, which *Shaw* owed to the plaintiff, and in reduction of the amount of that debt.

Verdict for the plaintiff.

Searlett and *Chitty* for the plaintiff.

Gurney for the defendant.

1817.

WILLIAMS and Another v. KEATS and
ARCHER.

After the dissolution of partnership between A. and B., and the advertisement of it in the *Gazette*, A. accepts a bill, bearing a date previous to the dissolution for the accommodation of a third person who indorses it for value, B. who permits his name to remain over the shop in the *Poultry*, as a member of the firm till after the dissolution of partnership and notice of it, and indorsement of the bill, is liable as a partner to a *bona fide* holder.

THIS was an action by the indorsees, against the acceptors of a bill of exchange, dated *December, 23d, 1816*, drawn by *Ambrose* on the defendants, for the sum of *220l. 10s.* payable to the order of the drawer six months after the date.

The defendant *Keats* had suffered judgment to go by default, and the defence on the part of *Archer* was, that he had ceased to be a partner when the bill was drawn.

It appeared, that the bill although bearing the date of *December 23d, 1816*, had in fact been drawn in the latter end of *February, 1817*, and had been accepted by *Keats*, for the accommodation of *Ambrose*, who knew that the partnership between the defendants had been previously dissolved. *Ambrose* kept it in his possession till *March*, and then negotiated it with the plaintiffs for value. Neither of the defendants had received any value for it. On the 13th of *January, 1817*, it was agreed, that the copartnership between the defendants should be dissolved; and notice was given in the *Gazette* of the 17th of *January, 1817*, announcing that the dissolution had taken place on the 31st *December* preceding. No particular notice of the dissolution of partnership

1817.

WILLIAMS
and Another

v.

KEATS
and Another.

partnership was brought home to the plaintiffs, and it appeared, that the names of *Keats, Archer and Co.* remained over the door of the defendants' shop in the *Poultry*, where they had previously carried on business as hatters till *April*, when *Colman's* name was substituted for *Archer's*.

Topping for the defendant *Archer* contended, that he could not be bound by an acceptance of his partner subsequent to the dissolution of the partnership; and he attempted to distinguish this case from those, where former dealings have taken place between the parties; for there he admitted, that it was necessary to shew, that it was necessary to prove notice to the party.

Marryatt contended, that it was incumbent on the defendant *Archer* to prove notice of the dissolution, since whatever might be their private arrangements between themselves, to the world they remained partners, till the name of *Colman* was substituted for that of *Archer*.

Lord ELLENBOROUGH was of opinion, that it was necessary that the defendant should bring home some notice to the plaintiffs. He had imprudently suffered notice to be given of the continuance of the partnership, by permitting his name to remain over the door till *April*. Notice in the *Gazette* was not to be considered as notice of the dissolution of partnership to all the world, it was

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WILLIAMS
and Another

v.

KEATS
and Another.

a medium of knowledge, but not equivalent to actual notice.

Verdict for the plaintiffs.

Marryatt and *Reader* for the plaintiffs.*Topping* for the defendant *Archer*.*overruled by
Hay v. Cross
20 d. J. Rep 361.*

WILLIAMS v. STOUGHTON.

Where the agreement on which the action is brought, is contained in a prospectus of terms delivered by the plaintiff to the defendant, it is necessary to get that identical copy stamped, which has been delivered, and it is not sufficient to get another copy stamped.

THIS was an action of special assumpsit brought by the plaintiff who kept a boarding-school, to recover from the defendant, for the board and schooling of two of his children for one year. The children had been taken away at the end of the first half year; and in order to entitle the plaintiff to his demand, it was necessary to resort to a prospectus of his terms, a printed copy of which had been delivered by the plaintiff to the defendant, when he agreed to send his children. By the terms of this prospectus, it was stipulated on the part of the plaintiff, that unless three guineas were paid upon entrance, if three months' previous notice of the removal of the child should not be given, the plaintiff should be entitled to be paid for the whole year.

The plaintiff produced a printed copy of the prospectus, stamped with an agreement stamp.

Marryatt for the defendant objected, that this could not be received in evidence, since it was not the

the identical prospectus which had been delivered to the defendant. — Notice on the part of the plaintiff to the defendant, to produce the copy actually delivered was then proved, and the copy was accordingly produced.

1817.
WILLIAMS
v.
STOUGHTON.

Marryatt objected, that this could not be read, since it was unstamped, and the evidence was accordingly rejected.

Gurney and *Arabin* for the plaintiff.

Marryatt for the defendant.

DOE on the Demise of. VICKERY v. JACKSON.

THIS was an action of ejectment, brought against the assignee of the lessee of a house, on a forfeiture for breach of covenant.

The breaking a doorway through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, amounts to a breach of covenant to repair.

The lease contained a particular covenant, to repair within three months after notice, and also a general covenant to keep in repair. The evidence of dilapidation principally relied upon, was that the defendant had broken a door-way through the wall of the demised house into the adjoining house.

Gurney for the defendant contended, that the breach of covenant had been waived by the subsequent acceptance of rent after notice given, and said

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that

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DOE
on Dem. of
VICKERY
v.
JACKSON.

that it had always been the intention of the party to rebuild the wall before the end of his term; but —

Lord ELLENBOROUGH held, that this was a continuing breach and a want of repair, which amounted to a forfeiture.

Scarlett, Marryatt, and Chitty for the plaintiff.
Gurney and Deacon for the defendant.

CHAPMAN and Others v. DE TASTET.

Commission of
5 per cent on
the sum laid
out, allowed to
a surveyor on a
*quantum me-
ruit.*

THIS was an action of *indebitatus assumpsit* for work and labour.

The only question was, whether the plaintiffs, who had been employed by the defendant, as surveyors, in superintending certain alterations in his buildings, were entitled to a commission of five *per cent.* on the sums laid out, as surveyors.

On the part of the defendant, it was contended, that the sum claimed was too large, especially, since in making such a charge, the surveyor was interested in increasing the expence.

Evidence was given that this was the usual mode of charging for business of that description.

Lord ELLENBOROUGH left it to the jury to say, whether this mode of charging was vicious or unreasonable,

reasonable, and if they thought it was, to deduct accordingly.

The jury found for the plaintiffs for the whole demand.

1817.

CHAPMAN
and Othersv.
DE TASTET.

Marryatt, Comyn, and Campbell for the plaintiffs.
Scarlett for the defendant.

COVERLEY v. BURRELL.

THIS was an action of assumpsit, brought to recover a deposit from the auctioneer, on the purchase of an annuity payable by the *Waterloo-Bridge Company*.

The sale was by auction at *Garraway's* coffee-house, and lot the first (the annuity in question), was described in the particulars, as an annuity of 64*l. per annum*, payable half-yearly, well secured upon the valuable concern, the *Waterloo* bridge, and payable out of the first tolls received from the *Waterloo* bridge.

It appeared that the bridge was established by virtue of two acts of Parliament, viz. the 49 G. 3. c. 191. s. 7., and the 53 G. 3. c. 184. The first of these acts enabled the commissioners to raise the sum of 100,000*l.* by way of mortgage, and the latter statute enabled them to raise the further sum of 300,000*l.* by the grant of annuities payable out of the tolls, but the annuitants had no preference in payment before the mortgagees.

The purchaser of an annuity by the *Waterloo-bridge Company*, which is described as well secured, and payable out of the first tolls received, and is not described as a redeemable annuity, cannot afterwards object to the completion of the purchase, on the ground of misdescription, provided the annuity has been granted in conformity with the act.

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COVERLEY

v.

BURRELL.

Marryatt for the defendant, objected, that the annuity in question did not answer the description in the particulars, since the annuitants were not to be paid out of the first tolls in preference to the rest of the creditors, and the annuity was not well secured, since for the last year and a half, no annuitant had received any thing; but —

LORD ELLENBOROUGH. — The annuities are payable out of the first tolls, although not exclusively. By security is meant legal obligation, and the non-payment arose from the deficiency of assets, and not from any defect in the security, the annuity was created by virtue of a public act, accessible to every one, which any prudent man would look into.

Marryatt then objected, that the annuity had not been described to be, as it was in fact, a redeemable annuity. The original price was 480*l.* and the annuity was redeemable at the end of five years; three of which had expired, and no one would give 580*l.* the sum which the plaintiff bade, for such an annuity, redeemable on certain events in two years; but —

LORD ELLENBOROUGH inclined to think, that if the annuity was granted conformably with the act, it was sufficient.

Marryatt then objected, that it was not one entire annuity, but consisted of eight several annuities

annuities of 8*l.* each, and that these had not been granted in conformity with the act, since they had been granted in consideration of the payment of one-eighth part of the purchase-money paid *in presenti* and in consideration of the payment of the remaining seven-eighths at a future time.

1817.

COVERLEY
v.
BURRELL.

LORD ELLENBOROUGH overruled the former objection, but reserved the latter question for the opinion of the Court.

Verdict for the plaintiff.

Marryatt and *Comyn* for the plaintiff.

Gurney and *Barnewall* for the defendant.

BROWN v. CROOME.

Monday,
Jan. 12.

THIS was an action against the defendant for publishing a libel.

A commission had been taken out against *Brown* and *Moss*, who were partners, and they had been declared bankrupts in the country. The defendant had acted as the solicitor under this commission. *Brown* was also a partner with *Toxer* and Co., and a petition had been presented

An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt is libellous, although published with the avowed intention of con-

vening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security if the legal object might have been attained by means less injurious.

to

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to the Lord Chancellor, in order to supersede the commission against *Brown* and Co.

The publication complained of was an advertisement published in a public newspaper in *Gloucestershire*, (in which county *Brown*, and most of his creditors, resided,) and was addressed to the creditors of *Brown* and Co., and in substance charged *Brown* with having, without the knowledge of his partners, drawn bills on the firm to the amount of 10,000*l.*, and with having raised money by forced sales to the amount of several thousands, in order to serve *Tozer* and Co., who were favoured creditors, to the injury of the claimants on the estate of *Brown* and Co. to that amount; and that a petition had been preferred by one of the favoured creditors, to supersede the country commission, in order that a separate commission might be proceeded on in *London*, and be there supported by the favoured creditors. The advertisement then called on such of the creditors as were disposed to resist these proceedings, to call at Mr. *Croome's* office and subscribe their names.

The defendant had pleaded the general issue only.

Topping for the plaintiff was insisting upon the falsity of the statement: but —

Lord ELLENBOROUGH intimated to him, that although it certainly was competent to him to go into such evidence, the consequence of so doing

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would

would be to let in evidence on the other side of the truth of the statement.

1817.

BROWN

v.

CROOME.

Scarlett for the defendant contended, that this was a privileged communication made by the defendant in the course of his duty as a professional man, at the instance of his client; and he proposed to go into evidence of the circumstances, in order to shew this.

LORD ELLENBOROUGH. — It is all irrelevant, except for the purpose of repelling the inference of malice, since there is no justification on the record. The truth of the statement is out of the question. No doubt it was competent to the petitioning creditors, and to the solicitor under the commission, to convene the creditors for the purpose of consulting as to the course which it might be advisable to pursue after the petition had been preferred, in order to supersede the commission. The question is, whether the defendant was justified in publishing this advertisement to the world, when all the communication which was necessary might have been made in a manner less injurious. In that point of view, and to that extent, I think the publication is libellous.

Scarlett proposed to shew, that under the circumstances this was the only mode of publication that could be adopted, since the creditors were numerous and dispersed. In the case of *Delany v. Jones*,

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BROWN

v.

CROOME.

v. Jones (a), which was a libel, imputing the offence of bigamy to the plaintiff, the advertisement had been published in a newspaper. (Lord ELLENBOROUGH. — In that case the publication did not assert any thing of bigamy.) That it could make no difference whether the publication was by a newspaper, or by means of handbills. The only question was whether the publication was done maliciously; and it was for the jury to consider, under the circumstances, whether the occasion did not justify the mode of communication; and he illustrated his argument by reference to the cases of actions brought by servants against former masters, where it was necessary for the plaintiffs to shew that the communication was malicious and false, and where the words were justified by the particular occasion on which they were used. And he instanced, also, the case of attorneys, who draw up their briefs from the information of their clients, but who are not liable to an action for the contents. So in the case where a robbery has been committed, and a servant has absconded who is suspected of the crime, an advertisement stating, that such a person was suspected would be justifiable. He submitted, that it was legal to advertise for a meeting of the creditors under the circumstances of the case, and that the newspaper was the proper channel for making the communication; every man had a right to protect himself and his property, although

(a) 4 Esp. R. 191.

it

it might be to the detriment of another, and there was nothing peculiar to the law of libel to distinguish it from all other cases.

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BROWN

v.

CROOME.

LORD ELLENBOROUGH observed, that if the publication in question had merely suggested doubts, without alleging the facts, as in the case of *Delany v. Jones*, the main grievance would have been wanting. If it could be shewn, that an advertisement in the *Gloucester* paper, was the only possible means of communicating notice of the circumstances, it might be sufficient to vindicate the mode; one person could have no right to take measures for his own benefit to the injury of another; the argument which had been used was ingenious, but the defendant made no progress in his defence, unless he could shew that such a publication was the only effectual mode of convening the creditors. A communication sufficient for the purpose might have been made in measured language. The want of proper caution had rendered the publication actionable, as being published to the world at large; this made an essential distinction, which applied to all the cases; in the instance of a brief to counsel, for instance, the publication as between the attorney and the counsel might not be libellous, and yet if it were to be printed and published, there might be a libel in every line. Every *unauthorised* publication to the detriment of another, was in point of law, to be considered as malicious.



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BROWN

v.

CROOME.

The plaintiff afterwards took a verdict for nominal damages by consent.

Topping, Gurney, and Campbell for the plaintiff.
Scarlett, Puller, and Tindal for the defendant.

CROOKE v. EDWARDS.

Upon an issue to try whether an act of bankruptcy has been committed, a creditor is incompetent as a witness, although he has not proved under the commission.

— *Qu.* whether a commissioner under the commission is a competent witness to prove the bankruptcy.

THIS was an issue directed by the vice-chancellor to try first, whether *Edwards* who had been declared a bankrupt under a commission of bankruptcy, had committed an act of bankruptcy before the commission was sued out; and 2dly, whether at the time of the act of bankruptcy a good petitioning creditor's debt existed.

In order to prove the affirmative, *Harrison* a creditor of *Edwards's* was called, who stated on the *voir dire*, that he had proved no debt under the commission.

On the part of the defendant it was objected, that he was an incompetent witness, since although he had not yet proved under the commission, he might afterwards do so. And the case of *Adams and Others v. Malkin (a)*, was cited, which was tried before *Gibbs*, C. J., who assented to the objection in a similar case, and held that it was fatal to the competency of the witness, as well upon the trial of an issue as of an action. And that in the case of *Williams v. Stevens*, the Lord Chancellor

(a) 3 Camp. 543.

had

had observed, that it was not sufficient that the witness had not accepted any dividend, it ought to be certain that he never would.

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CROOKE
v.
EDWARDS.

Topping for the plaintiff answered, that the object of calling this witness, was not for the purpose of increasing a divisible fund, in which he was interested, but to prove the act of bankruptcy.

LORD ELLENBOROUGH said, that he inclined to the opinion expressed by the Lord *Chancellor*, in the case of *Williams v. Stevens*, for the commission was to be considered as a benefit to the witness, since it brought a divisible fund within his reach, and by supporting the commission he enlarged the means of satisfaction. (a)

Mr. *Brookfield* who had acted as one of the commissioners under the commission, was afterwards called on the part of the plaintiff.

On the part of the defendant it was objected, that a commissioner could not be called to support his own commission, since he had received fees, he did not act judicially, and was liable to an action of trespass, in case the commission should be overturned.

LORD ELLENBOROUGH observed, that he could not be called upon to refund the fees which he

(a) See *ex parte Osborne*, 1 Rose, 387, 392. *Williams v. Stevens*, 2 Camp. 301. *contra*.

had

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EDWARDS.

had received, and his lordship permitted the witness to be examined, saying that he would not then pronounce upon the question.

The jury found for the defendant on both questions.

JONES and Others v. HIBBERT.

The drawer of a bill accepted for his accommodation, indorses it for value to his bankers, and before the bill becomes due, becomes bankrupt. The bankers, who knew that the bill was accepted for the accommodation of the drawer, cannot recover from the acceptor more than the amount of their balance, as between them and the drawer at the time of his bankruptcy.

THIS was an action by the plaintiffs, as the indorsees of a bill of exchange against the acceptor.

The bill was drawn on the 2d of *June*, 1817, by *Phillips and Co.* on the defendant, for the sum of 415*l.* 17*s.* 6*d.*, payable to the order of the drawers, three months after date, and indorsed by *Phillips and Co.* to the plaintiffs.

It appeared that this bill had been accepted for the accommodation of *Phillips and Co.*, and had been indorsed by them to the plaintiffs, who were their bankers for value, and that the latter knew that the bill had been accepted for the accommodation of *Phillips and Co.* *Phillips and Co.* before the bill was due became bankrupts, and the cash balance with the plaintiffs was then 150*l.* in favour of *Phillips and Co.*, for which sum the assignees of *Phillips and Co.* had since brought an action against the plaintiffs.

On the part of the defendant it was contended that the plaintiffs were not entitled to recover more

than 265*l.* 17*s.* 8*d.* which was the sum really due to them, as between themselves and *Phillips and Co.*

1817.

JONES
and othersv.
HIBBERT.

On the part of the plaintiffs it was insisted, that they were entitled to recover the whole amount of the bill, since they were liable to the assignees of *Phillips and Co.*, for the balance of 150*l.* in favour of *Phillips and Co.* at the time of their bankruptcy.

BAYLEY, J. was of opinion that the proper view of considering the case was, to lay the bankruptcy of *Phillips and Co.* out of the question, since their assignees could not stand in a better situation than the bankrupts themselves. According to this view of the case, the plaintiffs could not recover more than 265*l.* 17*s.* 8*d.* since that was the balance really due, as between the plaintiffs and *Phillips and Co.* If the plaintiffs had been entitled to recover the whole, the defendant would have been entitled to recover the amount against *Phillips and Co.*, and the latter again would have recovered the difference from the plaintiffs. To prevent circuitry of action the plaintiffs could have recovered no more than the balance due as between them and *Phillips and Co.* Upon this view of the case he was of opinion that the plaintiffs were not entitled to recover more than the balance.

Verdict accordingly.

Scarlett and Chitty for the plaintiff.

Tindal for the defendant.

1817.

HURST and Others, Assignees of FOSTER,
v. GWENNAP.

The assignees of a bankrupt may maintain trover against one who has purchased goods from the bankrupt in the usual course of his trade after a secret act of bankruptcy, although the goods were purchased on sale and return, and although the assignees afterwards demanded payment from the defendant, as upon a sale of the goods.

THIS was an action of trover, brought by the plaintiffs as the assignees of *Foster*, a bankrupt, to recover the value of certain books.

Foster was a bookseller, and on the 14th of *June* the defendant called at his shop and purchased two books of the value of 35*l.* and 25*l.*, on sale and return. An act of bankruptcy had then been committed, but it did not appear that the defendant had any knowledge of the bankruptcy. Four days after the sale a commission of bankrupt was sued out against *Foster*. The assignees under the commission afterwards applied to the defendant to know whether he intended to keep the books or to return them, and he informed them that he should keep them. The assignees afterwards applied for payment of the amount, and sent in a bill of parcels, making the defendant debtor to *Foster*, and requesting payment to themselves as assignees.

The defendant answered that *Foster* was indebted to him, and that he was ready to set off the price of the books. No subsequent demand of the books had been made before the action was brought, and the books still remained in the possession of the defendant.

Gurney for the defendant contended, that the assignees were not entitled to maintain an action of trover

trover against the defendant, who had bought the goods in the usual course of trade, and knew nothing of the bankruptcy. That the assignees having applied to the defendant to know whether he would keep the books, and on his determination so to do, having demanded payment, had thereby affirmed the sale, and could not afterwards consider him as guilty of a conversion, and that at all events a subsequent demand was necessary ; — but,

1817.
 HURST
 and Others
 v.
 GWENNAP.

Lord ELLENBOROUGH was of opinion that the action was maintainable, since the very act of taking the goods from one who had no right to dispose of them, was in itself a conversion. (a)

Verdict for the plaintiff.

In the ensuing term *Gurney* moved for a rule to shew cause why there should not be a new trial, on the grounds which he had urged before, but the Court refused a rule *nisi*.

(a) This cause was tried at Westminster, the sittings after Trin. 1817.

ERRATUM.

Page 161. In the marginal note, for "*by taking possession,*" read "*on taking possession.*"

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings after Hilary Term,

58 GEORGE III.

WESTMINSTER.

PAGE v. GODDEN.

1818.

HIS was an action on a covenant in a lease by the plaintiff to the defendant, by which the defendant covenanted to insure the life of *Elizabeth Alderson*, on whose decease the plaintiff's interest in the premises was determinable, for the sum of £100 during the term. The breach assigned was, the defendant's neglect to insure the life of *Elizabeth Alderson*, from the year 1810 to the commencement of the action.

The defendant had pleaded 1st, *non est factum*; 2dly, his bankruptcy and certificate; 3dly, he pleaded his bankruptcy more specially, and that his assignees had accepted the lease, and therefore that he was discharged. To this last plea the plaintiff replied that the assignees had not accepted the lease.

A Bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sell his estate and reversionary interest in the premises. This amounts to an acceptance of the lease by the assignees.

1818.

PAGE

v.

GODDEN.

It appeared that the plaintiff had let the premises to the defendant from May 1803, for the term of 22 years, excepting 30 days, if *Elizabeth Alderson*, the original lessee, should so long live. It appeared also that the defendant, *Godden*, was entitled to a reversionary interest in the premises, and that the assignees under the commission had executed an assignment to one *George Page*, which recited the lease of 1803, on which the action was brought, and which purported to convey all the estate and reversionary interest of *Godden*.

On the part of the plaintiff it was contended, that the assignees had, by this instrument, conveyed the reversionary interest only of *Godden*, the bankrupt, in the premises, and that there had been no acceptance of the lease by the assignees; but—

LORD ELLENBOROUGH was of opinion, that since the assignees potentially had the whole interest which the bankrupt possessed in the lease, and the instrument purported to convey the whole, the assignees must be considered as having assigned the lease, and therefore must have accepted it; and that the whole was a contrivance for the purpose of disposing of the lease, and retaining the defendant's liability for the insurance.

Plaintiff nonsuited.

Scarlett and *Comyn* for the plaintiff.

Topping and *Chitty* for the defendant.

IN THE COURT OF KING'S BENCH,

At the Second Sittings after Hilary Term.

WESTMINSTER.

LOESCHMAN v. MACHIN.

1818.

THIS was an action of trover, brought to recover the value of two piano-fortes.

The plaintiff was a maker of piano-fortes, and the defendant was an auctioneer. The plaintiff had lent one of the pianos, the larger, to a person of the name of *Brown*, whose wife was a musical teacher, on hire, for which *Brown* was to pay at the rate of 18s. per month, if he kept it for the whole year; and if for a less period, he was to pay a guinea per month. With respect to the other piano, it did not appear very clearly on what terms it had been delivered by the plaintiff to *Brown*, whether upon hire, or that he might dispose of it for the plaintiff. *Brown* had sent both these pianos to the defendant, to be sold by auction, and he, upon the plaintiff's application to deliver the pianos to him, refused to deliver them unless the plaintiff would pay the amount of certain expences which had been incurred.

The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion; and so is the auctioneer who refuses to deliver it up unless the expence incurred be first paid.

ABBOTT, J., in summing up to the jury said,
I wish you to find whether the smaller piano
y 2 was

1818.

LOESCHMAN

v.

MACHIN.

was let on hire, or sent to be sold by *Brown*, if an opportunity offered; this is a question of fact for your consideration; and although I am of opinion that it will make no difference as to the verdict, it will give the party an opportunity of making the distinction. The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the purchaser to see that the vendee has a good title. And I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.

The jury found that the smaller piano had been sent to *Brown* for the purpose of sale, and the plaintiff had a verdict for the value of both the pianos.

Leave was given to *Marryatt* for the defendant to move the point.

Scarlett and *Campbell* for the plaintiff.

Marryatt and *Chitty* for the defendant.

JOHNSON and Others v. The Duke of
MARLBOROUGH.

1818.

Feb. 17th.

THIS was an action by the plaintiffs as the indor-
sees of a bill of exchange, dated *January* the
29th, 1817, drawn by *Woodison* on the defendant,
payable to the order of the drawer, three months
after date, and endorsed by him to the plaintiffs.

Upon the production of the bill, it appeared to
have been dated originally on the 29th of *Decem-
ber* 1816; the alteration appeared to have been
made by the defendant, who had signed his accept-
ance immediately below the altered date.

The usual evidence of hand-writing having been
given, and *Abbott J.*, having intimated, that it was
necessary for the plaintiffs to prove, in addition to
this, that the bill had not been indorsed before the
alteration and acceptance ; —

Action by
the indorsee
against the
acceptor of a
note, the date
of which ap-
pears to have
been altered
by the ac-
ceptor; it lies
on the plain-
tiff to show,
that the alter-
ation was
made previous
to the indorse-
ment of the
note, by the
drawer to
whose order it
was made pay-
able.

Comyn, for the plaintiffs, submitted that it was
incumbent on the defendant to prove the affirma-
tive of that proposition; and that otherwise it was to
be presumed, that the bill had not been negotiated
previous to the alteration; but —

ABBOTT, J., said, that he could not presume
either one way or the other, and that unless it
could be proved that the alteration was prior to
the acceptance, the bill was void for want of a
new stamp.

1818.

JOHNSON,
and Others,
v.
The Duke
of MARLBOROUGH.

It was then proved, that the bill was in the possession of *Woodison*, the drawer, after the acceptance; and this was held to be *prima facie* proof that it had not been previously negotiated.

Verdict for the plaintiffs.

Comyn for the plaintiffs.

The cause was undefended.

Monday,
Feb. 16.

MORGAN v. BRYDGES and Another.

Proof of a copy of a bailable writ with the name of a sheriff's officer indorsed upon it, is not evidence, that the sheriff appointed that officer to execute the writ.

—
If a party in a cause be under the necessity of calling his real adversary in the cause, (who is not a party on record), although for the purpose of formal

THIS was an action by the plaintiff against the defendants, late sheriff of the county of *Middlesex*, for permitting the escape of *Godfrey Barnett*, whom he had arrested on mesne process.

The plaintiff gave, in evidence, an examined copy of a writ against *Godfrey Barnett*, at the suit of the present plaintiff, with *non est inventus* indorsed upon it, and also the name of *Shallcross*; and evidence was given, that it was the practice in the sheriff's office to indorse upon the writ the name of the officer or officers appointed by the sheriff to execute the writ; and that after an arrest it was usual for the bailiff to keep the warrant.

On the part of the plaintiff, it was contended, that this was sufficient evidence to prove that *Shallcross* made the arrest, under the authority of

proof only, he makes him a witness for all purposes, and he may be cross-examined as to the whole of the case.——*A.* gives credit to *B. C.*, who represents himself to be *D. C.*, and sues out a writ against *D. C.*, under which *B. C.* is arrested, the sheriff would be justified in detaining *B. C.*, but is not bound to do it.

the

the sheriff; and the case of *M'Neil v. Perchard and Another* (a) was cited; where it had been held that a copy of the writ, with the name of the bailiff indorsed upon it, was evidence to show that the bailiff was authorized by the sheriff.

1818.
MORGAN
v.
BRYDGES,
and Another.

Topping for the defendants contended, that the name appearing to be indorsed on the mere copy of the writ was insufficient; and he referred to the case of *Jones v. Wood* (b), *Blatch v. Archer* (c), and *Hill v. The Sheriff of Middlesex*. (d)

ABBOTT J., upon the authority of these cases, held, that it was incumbent on the plaintiff to give further evidence, to connect the defendants with the act of *Shallcross*.

Marryatt for the plaintiffs was then under the necessity of calling *Shallcross*, the bailiff who executed the writ, to produce the warrant.

The bailiff *Shallcross* having been sworn, produced and proved the warrant from the defendants under which he made the arrest; afterwards, when *Topping* was proceeding to cross examine the witness, *Marryatt* for the defendants, objected to the cross examination, since the suit was in fact the suit of the witness, and the sheriff was but the nominal party.

ABBOTT J., said, that it would be desirable that a

(a) 1 Esp. R. 263.

(b) 3 Camp. 228.

(c) Cowp. 63.

(d) 7 Taunton, p. 1.

1818.

MORGAN

v.

BRYDGES,

and Another.

sheriff's officer should not be examined in support of his own cause; but that, since he had been called as a witness for the plaintiffs, he was of opinion that he was to be considered as a witness for all purposes; and he was accordingly examined.

It afterwards appeared, that *Maurice Barnett* representing himself to the plaintiff as *Godfrey Barnett*, had purchased flannels of him to the amount of 108*l.*, upon which the plaintiff sued out a bailable writ against *Godfrey Barnett*, by virtue of which *Shalcross* the bailiff arrested *Maurice Barnett* (the real debtor) who had been pointed out to him as *Godfrey Barnett*. After the arrest, *Shalcross* finding that the real name of the party whom he had arrested was *Maurice Barnett*, and that he had a brother whose name was *Godfrey Barnett*, discharged him, and the action was brought upon this escape.

Topping for the defendants, contended that under these circumstances the action was not maintainable, since the writ was against *Godfrey*, and *Godfrey* had never been found; the allegation therefore that the defendants arrested *Godfrey* had not been proved. *Maurice* had not acquired the name of *Godfrey* by once representing himself to be *Godfrey*, so as to bind the sheriff, although undoubtedly he himself, as an individual, would be bound by that representation.

ABBOTT, J. permitted the plaintiff to take a verdict
13 for

for nominal damages, giving leave to the defendants to move to have a nonsuit entered.

1818.

MORGAN

v.

BRIDGES,
and Another.

A rule to show cause having been afterwards granted, the case was argued in the ensuing Trinity Term, when the Court were of opinion, that inas-much as *Maurice* had represented himself to be *Godfrey*, he himself would have been bound by that representation, and that the plaintiff might have proceeded against him in an action by that name, and that the sheriff would have been *justi-fied* in detaining him; but the question was whether he was bound to detain him, and the Court were of opinion that he was not. (a)

(a) See *Shadgett v. Clipson*, 8 East. 328. *Scandover v. Warner*, 2 Camp. 270. *Cole v. Hindson*, 6 T. R. 234. *Foster's Discourses*. 312.

SEARS v. LYONS.

Thursday,
Feb. 19.

THIS was an action of trespass for breaking the plaintiff's close and laying poison upon it, with intent to destroy the plaintiff's poultry.

Evidence was given of the defendant's having strewed poisoned barley, both on the plaintiff's pre-mises and his own, into which it appeared that the

In an action for throwing poisoned barley upon the plaintiff's pre-mises, in order to poison his poultry, the jury are not

confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant.

fowls

1818.

SEARS

v.

LYONS.

fowls sometimes escaped; it also appeared that some of the fowls had died in consequence.

Gurney for the defendant, contended that the plaintiff was not entitled to recover greater damages than the value of the fowls, and that the jury could not take into their consideration the malicious intention conceived by the defendant, and expressions which he had made use of with respect to the plaintiff.

ABBOTT, J., in summing up to the jury, cautioned them to guard against the hostile feelings which the evidence they had heard was likely to excite in their minds against the defendant. The action was brought for throwing poisoned barley upon the plaintiff's premises, and destroying his poultry; and it had been proved in evidence, that he had actually committed that injury; and that some of the fowls had died, although, whether from poison thrown on the plaintiff's premises or the defendant's did not appear. It had always been held, that for trespass and entry into the house or lands of the plaintiff, a jury might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury, and he said, that they were not confined in this case, to the mere damage resulting from throwing poisoned barley on the land of the plaintiff, but might consider also the object with which it was thrown, taking care at the same time to guard their feelings against the impression

sion likely to have been made by the defendant's conduct.

The jury found for the plaintiff, damages 50*l*.

Topping and *Garrow* for the plaintiff.

Gurney and *Reader* for the defendant.

1818.

SEARS

v.

LYONS.

HARDY v. WOODROOFE.

Thursday,
Feb. 19.

THIS was an action upon two promissory notes made by the defendant.

The first was dated *April 22d*, 1817, for the payment of 100*l*. eight days after date, and at the bottom of the note, in the defendant's hand-writing, were the words, "payable at 32, *Castle-street*, "*Holborn*."

In the declaration upon this note, it was alleged, that the defendant, eight days after the date, promised to pay to the plaintiff the sum of 100*l*.; and that he then and there made the said promissory note payable at 32, *Castle-street*, *Holborn*.

The second note was made payable at *Guildford*. The plaintiff proved that when the first note became due, he presented it for payment at 32, *Castle-street*, *Holborn*, and that the answer was "no effects," and that he also presented the former note on the day when it became due, at two banking houses at *Guildford*, the defendant then living at *London*.

At *G.*, the maker being absent from *G.* when the note became due, is sufficient evidence of a presentment to the maker at *G.* as alleged in the declaration.

The maker of a promissory note by a note at the foot, makes it payable at a particular place, an allegation (after stating the promise to pay in the usual manner,) that the defendant then and there made the note payable at the particular place, does not amount to a mis-description of the note.

A promissory note is made payable at *G.*, a presentment at a banker's

E. Lawes

1818.

HARDY
v.
WOODROOFE.

E. Lawes for the defendant, contended that the plaintiff was not entitled to recover in respect of either note. The first, he contended, had been mis-described in the declaration, which had improperly stated it to be payable at a particular place. And in support of this position he relied on the case of *Exon v. Russell*. (a) With respect to the latter note, which was payable at *Guildford*, he contended that the plaintiff had not proved the allegation in his declaration, viz. "that he shewed and presented the said last mentioned note to the said defendant at *Guildford*," there was no evidence of any presentment to the defendant at *Guildford*, or to connect the presentment at the banker's with the defendant.

Scarlett for the plaintiff contended, that as to the first objection there were two sufficient answers, 1st, the note at the bottom of the promissory note making it payable at 32, *Castle-street, Holborn*; and 2dly, that the case differed from that of *Exon v. Russell*, since the declaration did not describe the place of payment as part of the note itself, as had been done in the case of *Exon v. Russell*, it merely alleged that the note was payable at the particular place, and not that it was so payable according to the tenor and effect of the note.

As to the 2d note, the defendant had contracted to pay the amount at *Guildford*; he had no right to object that he was not there; if he had been there the note would have been presented to him there.

(a) 4 Maule and Selwyn, 505.

ABBOTT, J., was of opinion that the allegation that the defendant had made the first note payable at the particular place, was proved by the words themselves, in the defendant's hand-writing; and that a presentment at *Guildford*, the defendant not being there, was a presentment to him.

1818.
HARDY
v.
WOODROOFE.

Verdict for the plaintiff on both notes.

Scarlett and *Espinasse* for the plaintiff.

E. Lawes for the defendant.

In the ensuing term, the Court refused a rule *Nisi* for a new trial.

See *Price v. Mitchell*, 4 Campb.

OUGHTON v. WEST.

Friday,
Feb. 20.

THIS was an action of *assumpsit* on a promise by the defendant, to get a bill of exchange, of the amount of 30*l.*, discounted for the plaintiff, and to pay to him the amount; there was also an account for money had and received.

Declaration on a promise by the defendant to pay over to the plaintiff, the amount of a bill of exchange, delivered to him by the plaintiff, to get discounted.

It appeared that the plaintiff had delivered the bill of exchange in question to the defendant, to get it discounted. The defendant was a tailor, and it was also agreed, that he should make a suit of clothes for the son of the plaintiff, which was to be paid for out of the discount when received; the defendant was to make clothes for the plaintiff to the amount of 10*l.*, and to pay him 20*l.* in money. The defendant did not in fact discount the bill, but paid it to *Latham* and

The defendant having paid the bill in discharge of a debt of his own, is liable to the plaintiff as if he had discounted the bill.

Roberts,

1818.

OUGHTON

v.

WEST.

Roberts, his mercers, for a debt which he owed them, and he afterwards made clothes for the son of the plaintiff to the amount of 7*l.* 10*s.*, and afterwards tendered the plaintiff the sum of 1*l.* 19*s.*, which he refused to receive. *Roberts* and *Latham* had arrested the plaintiff upon the bill.

On the part of the defendant, it was contended, that he was not liable in the present action, since he had not, in fact, received any discount upon the bill, and since the agreement was not, that the whole of the discount should be paid to the plaintiff, but that he was to receive 10*l.* in clothes, and 20*l.* in money; but —

Lord ELLENBOROUGH was of opinion, that when the defendant paid the bill in discharge of a debt of his own, in effect he discounted the bill; and that the tender of the money was conclusive as to his liability. He could not have the benefit of a tender, without taking upon himself the inconvenience of an admission. The agreement was in effect, that the defendant should procure the bill to be discounted, and that clothes having been made by the defendant for the plaintiff, the amount, when made, should be deducted from the amount of the bill.

Verdict for the plaintiff.

Richardson for the plaintiff.

Gurney for the defendant.

STUART v. CRAWLEY.

1818.

THIS was an action against the defendant, a carrier of goods by the *Grand Junction Canal*, for negligence in losing a valuable greyhound which had been delivered to him to be carried from *London* to *Harefield Lock*.

It appeared that the servant of the plaintiff took the dog to the defendant's warehouse, with a string about his neck, and that the book-keeper of the defendant, to whom the dog had been delivered, gave a receipt, acknowledging the delivery. The dog was afterwards tied by the cord in a watch-box, but within half an hour afterwards he slipped from the noose, and had not since been heard of.

On the part of the defendant it was contended, that the dog had not been delivered in a state of security to the defendant's book-keeper; there was no collar about his neck, but only a cord, which was not sufficient to secure him; and that the case was similar to that of a delivery of goods imperfectly packed, and where the loss arises from want of care on the part of the owner. But —

A greyhound is delivered to a carrier, who gives a receipt for it, the greyhound being afterwards lost, the carrier cannot set up as a defence that the dog was not properly secured when delivered to him.

Lord

1818.

STUART

v.

CRAWLEY.

Lord ELLENBOROUGH held, that the defendant was responsible. In point of law the defendant had acknowledged the delivery of the dog to him by giving a receipt. The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. The present case was not of great importance; but the same point might occur upon a question of the greatest magnitude. After a complete delivery to the defendant, he became responsible for the security of the dog, the property then remained at the risk of the defendant, and he was bound to lock him up, or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for its security.

Verdict for the plaintiff.

Gurney and *Adams* for the plaintiff.

Marryatt for the defendant.

WHITE v. MATTISON.

1818.

THIS was an action of assumpsit to recover the plaintiff's wages as a seaman on board the ship *Louisa*, on a voyage from Buenos-Ayres to London.

By the ship's articles it was stipulated, that no seaman or officer should be entitled to demand his wages until twenty days after the arrival of the ship at her port of discharge or delivery of her cargo. On the part of the defendant it was contended, that the action had been brought by the plaintiff before the expiration of the twenty days.

It was then proved, on the part of the plaintiff, that before the commencement of the action the defendant had sent for the ship's crew in order to pay them their wages, when the plaintiff claimed wages to be due to him to the amount of 40*l.* and upwards, and the defendant then offered him 31*l.* which he admitted to be due to him for wages; but the plaintiff refused to take it, and the defendant told him, that if he would not take that he would get nothing. It was contended, on the part of the plaintiff, that he was at all events entitled to recover the sum of 31*l.* which had been admitted to be due.

A seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port, and the delivery of her cargo, held that although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, and which he had offered to pay him.

Marryatt for the defendant contended, that the plaintiff was not, because the parties had disagreed

1818.

WHITE

v.

MATTISON.

as to the amount of the sum due, therefore entitled to claim his wages at an earlier period.

Lord ELLENBOROUGH was of opinion, that the clause in the articles did not attach upon wages which the defendant had admitted to be due. It was to the defendant's advantage that he should not be liable before the expiration of twenty days, but he had himself offered to pay them, and had made a tender.

Reader and Platt for the plaintiff.

Marryatt for the defendant.

JEUNE v WARD.

On the day after the drawing of a bill of exchange payable at sight, the payee leaves it with the drawer for acceptance; a month afterwards the payee states that the drawee has refused to accept the bill and resorts to other measures for obtaining payment of his debt from the drawer; in ten days after this the drawee announces to the payee that he has destroyed the bill, conceiving it to be of no use. The drawer is not liable as the acceptor of the bill, (by three judges, Lord Ellenborough, C. J. dissentiente.)—Evidence of the time of birth.

THIS was an action by the plaintiff, the payee of a bill of exchange, against the defendant as the acceptor.

The bill in question was drawn on the 28th of May, 1817, by *Godfrey*, on the defendant, for the sum of 150*l.* payable at sight.

It appeared that the plaintiff had supplied *Godfrey* with a quantity of shoes as a venture to the East Indies, whilst he was a minor. *Godfrey* returned in the spring of 1817, and drew the bill

at

at the time of its date, and delivered it to the plaintiff in discharge of his debt, and he was then, as contended by the plaintiff, of age. The defendant *Ward*, was joint executor along with one *Stubbin*; under the will of Mrs. *Leake*, who had left *Godfrey* a legacy of 200*l*. After the bill had been so drawn, the plaintiff, on the 29th of *May*, delivered it to the defendant for acceptance. The defendant never returned the note, but on the 9th of *July* wrote a letter to the plaintiff, informing him that he, the defendant, had destroyed the note, which could not be of use to any one. The plaintiff, about the latter end of *June*, introduced himself to *Egerton* with a letter from the defendant, the contents of which did not appear: he informed *Egerton* that he had applied to the defendant for his acceptance of the bill, but that he had refused to accept it. *Egerton* told the plaintiff that he thought the defendant had done right, since the drawer was not of age, and that before payment of the legacy a discharge ought to be given to the defendant under the legacy act, and the duty should be paid. The plaintiff then requested that *Egerton* would afford him some facility in recovering the money, and *Egerton* promised that he would. The defendant supposing that *Godfrey* would attain to the age of twenty-one on the third of *July*, a meeting was appointed to take place on the fifth of *July*, when the legacy was to be paid, and the plaintiff, by the direction of *Egerton*, attended in order to recover payment of his bill. This money was not paid on the fifth, and *Godfrey* afterwards

z 2

received

1818.

JEUNE

v.

WARD.

1818.

JEUNE

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received it without the plaintiff's privity. On the part of the plaintiff it was contended, that the conduct of the defendant in keeping and destroying the bill, made him liable as an acceptor, in case the defendant had not meant to accept the bill, he ought, according to the course of business, and the custom of merchants, to have returned it to the plaintiff; by the destruction of the bill he had deprived the plaintiff of his security for his debt. The cases of *Harvey v. Martin*, 1 *Camp.* 425. n. and of *Trimmer v. Oddie*, *Bayley on Bills* 88. 3 *Ed. cor.* Lord *Kenyon*, were cited, and also the case of *Bentinck v. Dorrien*, 6 *East.* 199. to shew that by the detention or mutilation of a bill of exchange, and *a fortiori* by its destruction, the drawee made himself liable as acceptor.

On the part of the defendant, it was contended that under the circumstances of the case, the detention and the destruction of the bill did not amount to an acceptance, according to the custom of merchants. He might possibly be liable in a special action for destroying the bill, but there was no authority to shew that the mere act of destruction amounted to an acceptance. In the cases where a detention of the bill had been held to be equivalent to an acceptance, the inference of acceptance had been drawn from the previous course of dealing between the parties, which were such, that the effect of detention was to induce the holder of the bill to believe that it had been accepted, and in some the question was, whether an acceptance once made could be revoked. In

the present case, on the contrary, it appeared in evidence that the defendant had, upon the plaintiff's application to him for that purpose, absolutely refused to accept the bill.

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LORD ELLENBOROUGH said, that he would allow the plaintiff to recover, reserving liberty for the defendant to move the point, but at the same time expressed a very strong opinion in favour of the plaintiff's right, to consider the defendant as the acceptor of the bill. There had been many cases where it had been held that the mere detention of the bill was sufficient to make the drawee liable as an acceptor, and if that was sufficient to constitute an acceptance, *a fortiori*, the utter extinction of the bill would be sufficient. His Lordship said, I recollect the case of *Trimmer v. Oddie*, which was tried before *Lord Kenyon*, who was of opinion that the detention of a bill when sent for acceptance, amounted to an acceptance; I should have thought it more adviseable to have declared on the special circumstances of the case, but his Lordship was of a different opinion. The only question is, whether, according to the custom of merchants, the defendant ought not to have returned the bill after it had been left with him for acceptance? The person on whom a bill of exchange is drawn, when it is presented to him for acceptance, ought to determine whether he will accept it or not; and if he determine not to accept it, he is bound to return it, for the party is entitled to the immediate use of the thing, and if the drawee deprive him of the

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use of the instrument by destroying it, he is as liable as if he had written his name upon it. (*m*)

It was also contended on the part of the defendant, that *Godfrey* was a minor on the 28th of *May*, when the bill was drawn. In order to prove this, a copy of a certificate of baptism of *Godfrey*, from the books of the *East India* Company, was given in evidence, from which appeared that *Godfrey* had been baptized at *Madras* on the 3d of *July* 1796. No witness was called to prove the time of the birth more exactly, and it appeared that the mother of *Godfrey* was still living.

Lord ELLENBOROUGH left it the jury to say, whether, under these circumstances, *Godfrey* was of age when he drew the bill, observing, however, strongly on the circumstance, that the defendant had called no witness to prove the precise time of the birth, although such evidence was in his power, and it was incumbent upon him to prove the minority.

The jury found for the plaintiff upon this fact, and he had a verdict for the amount of the bill. (*m*)

Gurney and *Espinasse* for the plaintiff.

Topping and *Gaselee* for the defendant.

(*m*) The case afterwards came before the court of King's-bench, upon a motion to set aside the ver-

dict for the plaintiff, and enter a nonsuit, when the same objection was made in argument by the counsel

used for the defendant as had been made at the trial; and it was suggested, that upon the evidence, it did not clearly appear that the bill had been left with the defendant for the purpose of being accepted or returned.

Lord ELLENBOROUGH. — I do recollect that at the trial any objection was made to the statement of the witness, that the bill was left with the defendant for acceptance, and that the defendant afterwards wrote, in answer to the plaintiff's application, that the bill had been destroyed by him; neither do I recollect, that *Egerton's* evidence was in contradiction of these facts; I proceeded on that which I considered to be the recognised course of mercantile dealing, that wherever a bill is sent for acceptance, after a reasonable time has elapsed (and more than a reasonable time had elapsed in this case), such detention is considered by the commercial world as equivalent to a refusal to redeliver; and that where the drawer of a bill omits to return it within a reasonable time, he incurs the same responsibility as if he had accepted the bill. In the present instance, more than a reasonable time had elapsed without the return of the bill; the defendant had, by his own act, put it out of his power ever to return it, and there were no means of recreating the document which he had destroyed, and the plaintiff was thus deprived of the means of proof against the drawer. It has been held, that there is no case in the books which warrants this doctrine; but it appears to me, that the principle laid down by Lord *Byng*, in the case of *Trimmer v.*

Oddie, goes to that extent. When a bill is taken and left for acceptance, it is incumbent on the drawee either to accept or return the bill. But it is objected in this case, that the defendant refused to accept the bill. I find it stated upon my note that *Ward* refused to accept it, but it does not appear whether this refusal was prior, or subsequent to the time when, by the destruction of the bill, he had rendered himself incapable of doing either act. The bill was left on the 29th of *May*; the conversation between the plaintiff and *Egerton* was in the latter end of *June*, and the letter in which the destruction of the bill was stated, was not written till the 9th of *July*. The bill therefore might have been a month in his possession before he announced whether he would accept it or not. If the bill was not left for acceptance, the plaintiff's case of course falls to the ground; but it appears to me that there was sufficient evidence to shew that it was left for acceptance. The defendant must have acted on the determination which he had formed previous to the 2d of *July*, and it does not appear that he ever notified any determination not to accept till the end of *June*. Since therefore the defendant detained the bill beyond a reasonable time, and ultimately destroyed it without signifying any refusal to accept it, it appears to me, that he has made himself responsible as an acceptor, and that the rule must be discharged.

BAYLEY, J. — On the best consideration, I cannot say, that the defendant is to be considered as the acceptor of this bill. The bill, it appears, was drawn on the 28th of

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May, payable at sight. On the 29th of *May*, some application was made by the plaintiff to the defendant, this must have been either for the payment or for the acceptance of the bill, but the bill was not paid, and there is no reason to suppose that there was any acceptance of the bill at that time. The bill, however was then left in the possession of the defendant, where it remained till it was ultimately destroyed by him. Where a bill of exchange is left for acceptance, in the ordinary course of commercial transactions, it is the duty of the party to call for it within a reasonable time, in order to ascertain whether it has been accepted or not, unless, as in one of the cases cited (*Harvey v. Martin*), some other and peculiar course of dealing has been established between the parties. In this case, it does not appear that the plaintiff ever called for the bill, which is a circumstance of considerable importance to the present question. I forbear to state, at present, what my opinion would be in case of the destruction of a bill so left within a reasonable time. I am not prepared to state, that if the party on application said, I have destroyed the bill, it would amount to an acceptance. It would certainly render him liable to an action; but I think it would not amount to an acceptance. An acceptance is an engagement, it implies an act of the mind, in acceding to the request of another; how then can a refusal to accept be an acceptance? On this point, however, it is unnecessary to advance any opinion in the present instance, since it does not appear that the bill

was destroyed within that time, during which it could be considered as remaining for the purpose of acceptance. It appears, that after a month had elapsed from the delivery of the bill, the plaintiff called upon *Egerton*, and introduced himself by a letter from the defendant, which is not in evidence. He then communicates to *Egerton* that *Godfrey* was entitled to a legacy, and that the defendant had refused to accept the bill. It appears then, that the parties had not had frequent dealings with each other, but that this was a single transaction, unconnected with any usual course of dealing. The plaintiff does not complain to *Egerton* that the bill has been detained for an unreasonable time, but applies to him in order to procure his assistance in obtaining payment of his debt. *Egerton* says that the defendant has done right in refusing to accept the bill; but informs the plaintiff that *Godfrey* will be of age on the 3d of *July*, and that there is to be a meeting on the 5th, when *Godfrey* is to receive his legacy. What passed on the 5th does not appear, but the money was not paid. On the 9th the defendant writes to inform the plaintiff that he has destroyed the bill. The act of destroying the bill was either wrongful or it was excusable. If it was wrongful, the defendant was liable to an action of trover for the conversion; as an acceptor of the bill he would be liable to the whole amount of the bill; in an action of trover he could be liable only to the extent of the damage which the plaintiff had actually sustained. If notwithstanding the destruction of the

the bill he might still have had his remedy against *Godfrey*, he would not I think have been liable in trover to the full amount of the bill. If, on the other hand, the destruction was excusable because after a refusal on the part of the executor to accept the bill the plaintiff had no beneficial object in the possession of the bill, but intended to resort to his original demand against the drawer, it is possible that the circumstances might afford a good excuse to an action of trover. At all events, it appears to me, that the circumstance of the destruction of the bill does not amount to an acceptance by the defendant.

ABBOTT, J. — I am not able to satisfy myself that the defendant is liable as the acceptor of the bill. No case has been cited which is similar to the present ; and it is not likely that any such case can be cited, because the present transaction is out of the ordinary course of business. It appears that the defendant was one of two executors of a will, under which *Godfrey* was entitled to a legacy of 200*l*. On the credit of this legacy he draws a bill which he delivers to the plaintiff. This bill the plaintiff takes to the residence of the defendant, and returns without it. The next occurrence in this transaction is the application of the plaintiff to *Egerton* in the latter end of *June* ; he states that he has received a letter from the defendant, and desires him to afford him some facility in procuring payment of the money. The bill was drawn on the 28th of *May*, payable at sight, the plaintiff himself went down to the residence of the defendant, on the 29th of

May, and the whole transaction ought to have been completed early in *June*. The plaintiff, however, did not rely on the possession of the bill by the defendant as an acceptance by him, but applied to have the money intercepted in its way to *Godfrey*, which he would not have done had he relied on the detention of the bill. Now, one witness says that the defendant admitted that the bill had been left with him for acceptance. Another witness, *Egerton*, states that the plaintiff told him that the defendant had refused to accept the bill ; when he refused, and whether the refusal was by letter does not appear ; but that the plaintiff did not consider the defendant liable may be inferred from his having adopted other means, and procured other facilities for obtaining payment. Upon the whole, therefore, I am of opinion that the defendant is not chargeable as the acceptor of this bill. I have looked with great anxiety to those cases where a constructive acceptance has been held to be equivalent to an actual acceptance, since they introduce much uncertainty into the administration of the law. It would have been very desirable that nothing short of an actual acceptance on the face of the bill should have been deemed a legal acceptance.

HOLROYD, J.—I entertain much doubt upon the present question ; and were it not that I wish for further investigation of the facts by means of a new trial, I should have wished for further time for consideration. I have always understood that where a bill has been left for acceptance, and is not returned when called for, and the party

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party with whom it is left takes upon himself the disposal and ownership of the bill, he thereby renders himself liable as the acceptor; but that the mere omission to return the bill is not an acceptance, as where it is lost. In *Marius*, 29, 30. it is laid down thus: "If he loses the bill he shall give security for the payment, otherwise the bill shall be noted for non-acceptance or non-payment."

That does not go so far as the destruction of the bill, and if a bill payable at a future time were to be destroyed within the time limited for payment, I should think

that such a destruction amounted to an acceptance of the bill. The circumstances of this case are very peculiar, if from the conversation between the plaintiff and *Egerton* it can be collected that it was not intended that the bill should be any longer considered as an accepted bill on which the defendant was liable, I think that the subsequent destruction of the bill would not make him liable. At all events, I think there ought to be a new trial, in order that the facts may be put upon the record, that the case may be further considered in a court of error. Rule absolute.

See *Trimmer v. Oddie*, Guildhall Sitt. 1800. *Bayley on Bills*, 88. *Chitty on Bills*, 160. *Harvey v. Martin*, 1 Camp. 425. n. *Bentinck*

v. Dorrien, 6 East. 199. *Thorn-ton v. Dick*, 4 Esp. 270. *Clavey v. Dolbin*, Ca. T. Hardw. 278.

RICHARDSON v. ALLAN.

The Indorsee of a bill, in action against the acceptor, having called a witness to prove the indorsement, who disproved it, the plaintiff was afterwards allowed to call the indorser himself to prove his own indorsement.

THIS was an action by the indorsee of a bill of exchange against the acceptor.

The acceptance was admitted on the part of the defendant. The witness called by the plaintiff to prove the hand-writing of the indorsee, swore, that he believed that the indorsement was not in the hand-writing of the person whose indorsement it purported to be.

On the part of the plaintiff, it was then proposed to call other witness, to prove the indorsement in contradiction of the witness already called, and

and it was contended that the case was like that of a will, where the attesting witnesses called by party interested in supporting the will, may be contradicted by other witnesses.

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LORD ELLENBOROUGH said, that the present case was very distinguishable from those alluded to, since there, the witnesses called are imposed by the law, and the party is under the necessity of calling them, and having done so, is allowed to call other witnesses to contradict them; but in a case like this, the plaintiff had the whole world before him, in which he might seek for a witness who was acquainted with the hand-writing of the party; and he had full opportunity of ascertaining his knowledge upon the question, before he produced him as witness.

Gurney, for the plaintiff, afterwards proposed to call the indorser himself, and

LORD ELLENBOROUGH said, that although he should have had some difficulty in permitting the plaintiff to call another witness from the world at large, yet since the indorser, by proving the hand-writing to be his own, would charge himself, he would permit him to be examined.

Jones, the supposed indorser, was then examined, and having disclaimed the hand-writing, the plaintiff was nonsuited.

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Gurney and Pollock, for the plaintiff.*Raine*, for the defendant.

See *Alexander v. Gibson*, 2 Campb. 555. where a witness for the plaintiff having disproved a fact which he was called to prove, the plaintiff was permitted to call other witnesses to prove the fact. Although in the above case the party called to prove the indorsement was interested the other way, yet the principle seems to extend to the admission of any other witness to prove the fact, since the evidence in such a case must be a surprise upon the plaintiff, and it would be exceedingly hard upon him that he should be conclusively bound by the knavery of the witness, who had practised a gross fraud upon him.

GRAY v. MILNER.

The indorsee of a bill in an action against the acceptor, alleges that the bill was directed to the defendant; this allegation is not supported by proof that the drawer drew the bill payable to his own order, at a specified place, although the defendant, when it was presented there, wrote his name upon it as the acceptor.

THIS was an action by the indorsee of a bill of exchange, against the defendant, as the acceptor.

The declaration alleged in the usual form, that *William Sustenance* drew the bill, and directed it to *Milner*, (the defendant,) *Wilmot-street*, and thereby requested him to pay the amount.

On the production of the bill, it appeared that it was drawn by *William Sustenance*, payable to his own order, at No. 1, *Wilmot-street*, opposite *Lamb-street, Bethnal Green*; but it was not directed to the defendant as alleged. It appeared, however, that the defendant had written his name upon it when it was presented to him, at the place appointed for payment, as the acceptor.

Marryatt,

Marryatt, for the defendant, objected, that it was essential to 'prove the allegation in the declaration, that the bill was directed to the defendant, and that this had not been proved by the production of the bill, which bore no direction to the defendant.

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Scarlett for the plaintiff, contended, that the defendant, by his acceptance of the bill, had admitted the direction to himself, but

Lord ELLENBOROUGH was of opinion that the variance was fatal.

Plaintiff nonsuited.

Scarlett and *Platt*, for the plaintiff.

Marryatt, for the defendant.

HOULDITCH and Another v. DESANGES and Another.

THIS was an action by the plaintiffs, who were coachmakers, against the defendants as sheriffs of *Middlesex*, for the value of a carriage seized by them under a writ of *fi. fac.*

A person of the name of *Vignoni* had ordered the carriage in question to be made for him by the

neglecting to take the carriage, A. obtains a verdict against him for goods bargained and sold. Until the amount is paid to A., he has a lien upon the carriage, and the sheriff cannot seize it under a *fi. fu.* against the goods of B.

A. sells to B. a carriage, to be paid for partly by a bill upon the delivery, and partly by a bill at a future day, and B.

plaintiffs,

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plaintiffs, upon a contract that 100 guineas were to be paid for it at the time of delivery, and that the remainder should be paid by a bill at a date specified. It appeared that *Vignoni* had not taken away the carriage at the time appointed, and that the plaintiffs had afterwards brought an action against him for goods bargained and sold, and for the cleaning of the carriage, in which they had recovered. They had claimed also for standage; but had not recovered any thing for standage, there being no count for it in the declaration. It did not appear that the plaintiffs had derived any satisfaction from the verdict which they had so obtained. The defendants had seized the carriage by virtue of a writ of *fiery facias*, in an action at the suit of a person of the name of *Cash*, after notice that the plaintiffs claimed a lien on the carriage.

On the part of the defendants it was contended, that the plaintiffs, under the circumstances, could have no lien on the carriage, since there could be no lien where there was a specific contract to take away the goods at a particular time; the plaintiffs might indeed recover damages against the purchaser for not taking away the goods at the time appointed, but he could not detain for a lien. That the plaintiffs having recovered against *Vignoni*, could at all events no longer claim any lien on the property: they could not retain both the carriage and their verdict.

Lord

LORD ELLENBOROUGH.—The action was for non-performance of the contract ; if it had been for goods sold and *delivered*, the case might have been different ; as it was, the goods remained in the custody of the plaintiffs undelivered, and the verdict did not entitle the defendant in that action to the specific property before the money was paid. As between the plaintiffs and the purchaser, in case any hardship accrued to the latter from the detention of the carriage after the verdict and before payment, the case might perhaps be one for the interference of a court of equity, but with respect to the sheriff, the case is different ; the plaintiffs were in possession of a carriage unpaid for.

Verdict accordingly.

Gaselee and *Adolphus* for the plaintiffs.

Scarlett and *Comyn* for the defendants.

See *Mason v. Lickbarrow*, J. H. B. 363. 2 Bl. Comm. 448. *Hodgson v. Loy*, 7 T. R. 440. *Feise v. Wray*, 3 East. 93. Although the general property in goods vests in the vendee by the sale, a lien or special property resides in the vendee until payment. But if the vendor rely solely on the personal credit of the

vendee, or agrees to receive payment at a future day, the vendee's right of possession accrues immediately, and he may maintain trover or detinue without previous payment of the price. Com. Dig. tit. Agreement, B. 3. 5 Ed. 4. f. 2. 17 Ed. 4. f. 1. Whittaker on Lien, 144.

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CARTWRIGHT and Others v. WILLIAMS.

A. accepts a bill for the accommodation of B., which B. delivers to C. his creditor, to provide for a bill about to become due. C., before A.'s bill becomes due, returns it to B. as useless, in order that it may be forwarded to A., and abandons all claim upon the bill. C. cannot, by subsequently obtaining possession of the bill, acquire a right of action against A.

THIS was an action by the plaintiffs as the indorsees of a bill of exchange, against the defendant as the acceptor.

The bill was drawn by *Barnard* and *S. Williams*, upon the defendant, on the 30th of *June* 1817, for the sum of 90*l.* payable two months after date.

Barnard and *S. Williams*, the latter of whom was the son of the defendant, were in partnership, and were indebted to the plaintiffs to the amount of 300*l.* and the bill had been accepted by the defendant, *Mary Williams*, for the accommodation of the drawers. On the 19th of *August* the plaintiffs wrote a letter, inclosing the bill in question, stating that they placed no confidence in the bill which had been sent to them, to meet a bill payable on the 1st of *July*, and that they had handed the letter to *Barnard*, (to be returned to the defendant) in order to save postage.

— In such case B., who has become bankrupt, is a competent witness for A., after a general release by A., although he has not been released by his assignees.

The

The objection made by the plaintiffs to the bill was, that it was not negotiable, because the defendant was not in trade. In the interval between the 19th and the 26th of *August*, the bill came again into the possession of the plaintiffs, but by what means, or upon what terms, did not appear. On the 26th of *August* the defendant wrote to the plaintiffs to inform them that she had made arrangements for paying the bill, but it did not appear that the defendant knew that the bill had been returned to *Barnard*.

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On the part of the defendant, it was contended, that the plaintiffs had abandoned all claim upon the bill, by their letter of the 19th of *August*, in which the bill was inclosed to *Barnard*; and that the latter ought then to have sent it back to the defendant; and that *Williams* and *Barnard* could not, by any re-delivery of the bill to the plaintiffs, revive the liability of the defendant.

Scarlett, on the part of the plaintiffs, addressed the jury, relying principally upon the defendant's letter of the 26th of *August*, in which she stated that she had made arrangements for paying the bill.

LORD ELLENBOROUGH observed, that for any thing that appeared, the defendant was in entire ignorance that the bill had been returned to *Barnard*; and in summing up to the jury, he said, For what reason the plaintiffs chose to abandon the bill does not appear; but they did, in fact, abandon it,

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it, and inclose it in a letter to *Barnard*, to be delivered to the defendant ; and he ought to have sent it to her. Although the engagement on her part was voluntary, she would have been bound by it if they had chosen to keep the bill ; but having given it up, she was no longer bound. The moment the bill was returned to *Barnard*, he held it as a trustee for the defendant.

The plaintiff was afterwards nonsuited.

S. Williams, in the course of the cause, having been called as a witness for the defendant, he was objected to as incompetent ; it appeared that he had been released by the defendant, in the usual form, including all manner and cause or causes of action, claims or demands, which she ever had, &c. against *S. Williams*. It appeared also that he had been declared bankrupt. It was objected that a release by the assignees was necessary, since after Sir *S. Romilly*'s act in favour of sureties, if the plaintiffs recovered against the mother, she might prove the debt under the commission against the son ; but —

Lord ELLENBOROUGH was of opinion, that by the general terms of the release, the defendant had precluded himself from proceeding under the commission, and the testimony was accordingly received.

In

In the ensuing term a motion was made to set aside the nonsuit, and grant a new trial, on the ground that the testimony of *S. Williams* ought not to have been received ; but the Court were of opinion, that since the release comprehended all future claims to be made, in consequence of any cause existing at the time of the release, it extended to bar any claim by the defendant, as being a surety for *S. Williams* on the bill, since this was an inchoate cause of action then existing.

Rule refused.

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REX v. KROEHL and Others.

THIS was an indictment against three persons, *Kroehl*, *Gibson*, and *Koech*, for having conspired together to procure the discharge of the defendant *Kroehl* from custody, on mesne process, without giving notice to the plaintiff's attorney.

The three defendants defended separately, *Kroehl* and *Gibson* by different counsel, and *Koech* defended himself. After the counsel for *Kroehl* and *Gibson* had severally addressed the jury on behalf of their clients, *Koech* also addressed the jury, and endeavoured to throw the guilt of the transaction upon the other two defendants ; and he afterwards called one *Gibson*, the father of one of the defendants, as a witness, and examined him as to a conversation which had taken place between himself and *Kroehl*.

A A 2

Gurney,

Upon the trial of A. B. and C. for a conspiracy, where after the case on the part of the prosecution is closed, C. only calls witnesses and examines as to conversation between himself and A., the counsel for the crown may cross-examine such witnesses as to any other conversation between A. and C. although the evidence tend chiefly to criminate A.

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Gurney, on the part of the prosecution, was afterwards proceeding to cross-examine the witness *Gibson*, as to another conversation which had taken place between *Koech* and *Kroehl*.

Adolphus, on the part of the defendant *Kroehl*, objected to this, since the effect of it might be to bring out a new case against his client, although he had called no witnesses, and after the counsel for the crown had finished their case ; but —

ABBOTT, J., said, that since a witness had been called for the defendant *Koech*, he could not prevent the counsel for the prosecution from going into all the conversations which might affect *Koech* ; it might be a matter for future consideration, whether the counsel for *Kroehl* would, after such evidence, have a right to address the jury upon it.

The witness was accordingly examined on the part of the prosecution, as to several conversations between *Kroehl* and *Koech*, which principally affected the former. In the result *Kroehl* was acquitted, and the other defendants were found guilty.

BELL v. HUMPHRIES and Others.

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THIS was an action of assumpsit brought by the plaintiff, an insurance broker, to recover for insurances alleged to have been effected by the plaintiff, upon the ship *Betsy*, upon the retainer of the defendants.

A managing owner and part owner of a ship cannot bind another part owner by effecting an insurance on the ship without his authority.

The principal question was, as to the liability of *Poole*, one of the defendants. It appeared that *Humphries* and *Roberts* were general merchants, and that they had directed the insurances in question to be effected by the plaintiff, on the ship *Betsy*, and freight. They were managing owners of the ship, and part owners, and the defendant *Poole*, and two other defendants, who had suffered judgment by default, were also part owners. No direct evidence was given to shew that *Poole* had authorized the effecting of the policies, but evidence was given to shew that *Poole* had in a letter stated that *Bell*, the plaintiff, was broker for the ship, and that he had, in fact, acted as broker for three years; and it was contended, that since *Poole* had had the benefit of the insurance as part owner, he was jointly liable for the expence; but —

Lord ELLENBOROUGH was of opinion, that *Poole*, although a part owner, was not liable in respect of the insurances effected by the managing owners,

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without proof of an express authority given by him. As managing owners they had a right to order every thing to be done which was necessary for the ship; but a share in the ship was the distinct property of each individual part owner, whose business it was to protect it by insurance, and the insurance of another could not be binding upon such proprietors, without some evidence importing an authority by them. The plaintiff might have been the broker of *Poole* for other purposes, and therefore the mere fact that *Poole* had designated the plaintiff as his broker, was not sufficient to shew that he had given him authority to effect an insurance for him. It was clear that a managing owner had no right to effect an insurance for a part owner without his authority.

The counsel for the plaintiff being unable to prove any distinct authority, the defendants had a verdict.

Gurney and Heath, for the plaintiff.

Scarlett, for the defendants.

GREEN v. DEAKIN and Others.

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THIS was an action by the plaintiff, as the indorsee of a bill of exchange, dated *December 6th*, 1813, purporting to be drawn by the three defendants, *Deakin*, *Hickman*, and *Bickley*, payable to the order of *Hickman*, 75 days after date. As to the two latter defendants, who had pleaded their bankruptcy, the plaintiff had entered a *non pros*.

The three defendants were partners, and the defence was that the bill had been drawn by *Hickman* in the name of the firm, in fraud of the two other partners, in order to discharge a private debt of his own to the plaintiff.

It appeared that *Hickman* and *Bickley* were in partnership in the year 1809, before *Deakin* became a partner, and that *Green*, the plaintiff, then advanced the sum of 500*l.* to *Hickman*, to enable him to enter into partnership with *Deakin*, and in 1810 *Deakin* became a partner with *Hickman* and *Bickley*. *Hickman* having been called as a witness on the part of the defendants, stated that he had in part discharged the debt of 500*l.*, and that having been pressed to pay the remainder, he had drawn the bill in question in the partnership name, without the knowledge of his partners; but that he had not communicated to the plaintiff that this had been done without the concurrence of the

One co-partner cannot bind another by drawing a bill in the name of the firm for the discharge of his own private debt, without the knowledge of his co-partner; and this defence may be set up by the latter in an action by the indorsee of the bill, without giving any notice of his intention to dispute the consideration.

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GREEN

v.

DEAKIN
and Others.

co-partners; that *Deakin* never knew that he owed the plaintiff 500*l.*, and no entry of it had ever been made in the partnership books.

On the part of the defendant *Deakin*, it was contended, that the transaction was a fraud upon the defendant *Deakin*, and that the plaintiff being a party to the fraud, since he knew that the consideration was a private debt due from *Hickman* to himself, could not recover; and the cases of *Wilkes v. Shireff* (a), and *Ridley v. Taylor* (b), were referred to.

On the part of the plaintiff, evidence in answer to this case was adduced, for the purpose of proving that the produce of a bill, supplied by the plaintiff to *Hickman*, had been applied to the uses of the firm; but in this the plaintiff failed; and it was then objected, that notice ought to have been given by the defendant *Deakin*, of his intention to dispute the consideration; but —

LORD ELLENBOROUGH was of opinion, that the nature of the transaction was intrinsically notice and he directed that the plaintiff should be nonsuited, on the ground that one partner had no right to bind another without his knowledge, by drawing a bill for his own private debt.

Plaintiff nonsuited.

(a) 1 East, 48.

(b) 13 East, 175.

YORK SPRING ASSIZES.

58 GEORGE III.

REX v. SQUIRE.

1818.

THIS was an indictment against the prisoner under the statute 39 G. 3. c. 85. for embezzling 14 one guinea notes, alleged to have been received by him by virtue of his employment, as clerk and servant to the persons specified, who were overseers for the township of *Leeds*.

One who is employed at a yearly salary, under the appellation of accomptant and treasurer to the overseers of a township, whose duty it is to receive all monies receivable or payable by them, is a clerk and servant within the st. 39 G. 3. c. 85.

It appeared in evidence that the defendant had served the overseers of the township of *Leeds*, for many years at a yearly salary, under the name of their accomptant and treasurer; and that it was his business to receive and pay all monies receivable and payable on their account; and that the usual course of business as between the defendant and the overseers was, that he should render to them a weekly account of all monies received or paid by him within the week. It also appeared that on the 23d of *June* 1817, the defendant received the notes in question, from a person of the name of *Senior*, being money due from him as the overseer of another township, to the overseers of the township of *Leeds*, in respect of money supplied by the latter, to a pauper belonging to *Squire's* township, who

1818.

REX

v.

SQUIRE.

who resided within the township of *Leeds*. The defendant had made no entry of the receipt of this money in his weekly accounts, and it appeared that he had at different times omitted to insert in his accounts the receipt of other monies at various times to the amount of 1800*l.* and upwards.

It was objected on the part of the prisoner, that he was not a clerk or servant within the meaning of the statute ; but —

BAYLEY, J., left the case to the jury upon the question whether the prisoner intentionally omitted to enter the receipt of the money for the fraudulent purpose of applying it to his own use, and reserved the question of law for the consideration of the judges.

The jury found the prisoner guilty. (*a*)

(*a*) I have been since informed that the judges were of opinion that the case was within the statute.

LANCASTER SPRING ASSIZES.

ORFORD v. COLE.

1818.

THIS was an action by Miss *Orford* against the defendant Mr. *Cole* for a breach of promise of marriage. In order to prove the promise to marry, several letters from the defendant to the plaintiff were offered in evidence.

A letter read
to prove a con-
tract of mar-
riage need not
be stamped.

On the part of the defendant it was objected, that the letters could not be read, since they had not been stamped with an agreement stamp; but—

BAYLEY, J., admitted the evidence, and the plaintiff had a verdict for 7000*l*.

A rule *nisi* having been granted, upon a motion for a new trial, upon two grounds, 1st, that the letter ought not to have been received in evidence without a stamp; and 2dly, that the damages were excessive. The counsel for the defendant upon the first ground contended, that under the provisions of the statute (*a*) a stamp was necessary, since

(*a*) By the st. 48 G. III. c. 149. Sched. Part I. tit. Agreement,
“ Every agreement or any minute or memorandum of an agreement, made in England under hand only, or made in Scotland without any clause

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ORFORD

v.

COLL.

since the subject matter, a contract of marriage, could not be supposed to be of less value than 20*l*. Some contracts, indeed, such as contracts to indemnify, might not require a stamp, since it was not probable that the party would ever receive to the amount of 20*l*. upon the contract; but if the probable value of the subject matter exceeded 20*l*. the case could not but be considered as falling within the contemplation of the legislature. It was also contended, that the exemption from the necessity of a stamp did not apply, unless it appeared on the face of the contract that the subject matter was of less value than 20*l*.; and that where the value is uncertain and indefinite, a stamp is necessary; and that at all events a marriage contract was to be considered as of a pecuniary value, otherwise no action could be maintained for the breach of such a contract.

BAYLEY, J., said, that he was of opinion that a contract like the present was not within the meaning of the legislature so as to require a stamp. The argument on the part of the defendant had proceeded on the supposition that the case where the subject matter of the contract is not of the value of 20*l*. was an exception to the general

clause of registration, (and not otherwise charged in this schedule, nor expressly exempted from all stamp duty,) where the matter thereof shall be of the value of 20*l*. or upwards, whether the same shall be only evidence of a contract or

obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto," shall bear a stamp of the value of 16*s*.

clause;

clause ; but it was not an exception, but a substantive part of the enactment, which was not to operate at all, unless the matter of the agreement should be of the value of 20*l.* or upwards. This supposed that the value of the contract was measurable, in order to ascertain whether the subject matter did or did not amount to 20*l.*, and a contract of marriage was of a different description. His Lordship added, that he had not decided upon his own opinion only—that the Lord Chief Baron (RICHARDS) had concurred with him.

The rule was discharged.

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ORFORD

v.

COLE.

CASES
ARGUED AND DECIDED
AT
NISI PRIUS
IN K. B.

At the Sittings in Easter Term,
58 GEORGE III.

GUILDHALL.

1818.

KINDER v. HOWARTH.

A bankrupt carries on the business of a coachmaker for the benefit of the creditors, as their agent, under the authority of the assignee, and orders goods in his own name, which are used in the business, the assignee is liable for goods bought for the use of the business.

THIS was an action for goods sold and delivered. *Cooper*, a coachmaker in *Manchester*, had dealt with the plaintiff, who had supplied him with varnish, &c. used in his business, for many years. *Cooper* becoming bankrupt, the defendant was appointed the sole assignee, and it was agreed at the third meeting under the commission, that as there were several unfinished carriages on hand, the business should be continued under the agency of *Cooper*, who was to have an allowance, for the benefit of the creditors. *Cooper* accordingly proceeded in the management of the concern, and was twice supplied with varnish in his own name, to

to the amount of 22*l*. The defendant had called from time to time, and saw the business going on under the superintendence of *Cooper*.

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KINDER
v.
HOWARTH.

On the part of the defendant it was contended, that since the credit had been given to *Cooper*, he, and not the defendant, was liable ; but —

HOLROYD, J., was of opinion, that although the goods had in part been supplied to *Cooper*, yet since he was carrying on the business, not on his own account, but as the agent of the defendant, who acted as assignee for the benefit of the creditors, the plaintiff was entitled to recover.

Verdict accordingly.

Scarlett and *Deacon*, for the plaintiff.

Williams, for the defendant.

IN THE COURT OF KING'S BENCH.

*Adjournment Day, after Easter Term.*GUILDHALL.

1818.

Wednesday,
May 6th.

ISRAEL and Others v. SIMMONS.

Several persons rent premises to be used as a Jewish synagogue, the seats in which are let out by an officer appointed annually, who receives the rents and applies them partly in the payment of the rent for the premises and partly for general purposes connected with the Jewish religion, the lessees may maintain an action for the

THIS was an action of assumpsit brought by four plaintiffs, to recover from the defendant certain sums, alleged to be due for seats in a *Jewish Synagogue*, and for certain sums expended on behalf of the defendant, &c.

The plaintiffs were the four surviving lessees of certain premises in *Denmark Court, Strand*, which they, with several others, rented under a lease from one *Scott*, which premises were used as a synagogue. It appeared that it was part of the constitution of the society to appoint two treasurers annually, and several wardens, upon whom the management of their ecclesiastical affairs devolved. It was the duty of one of these treasurers to let the seats, and to deliver possession of them by a key, and to receive the rents, and to pay them

rent due from an occupier of a seat. — A Jewish synagogue is not an illegal establishment. — In an action by a surviving owner for use and occupation of premises, it is not sufficient to allege that the defendant held the premises by the sufferance and permission of the surviving owner only, where they were in fact held under two jointly.

over

over to the lessees of the premises. The office of the other treasurer consisted in the receipt and disposition of the offerings, and payments due in respect of the performance of certain ceremonies incident to their form of worship; and the superfluous funds in the hands of the one were used to supply any deficiency in the funds of the other. The lessees did not at all interfere with the letting of the seats, or the disposition of the funds which accrued from the letting. The defendant had become a member of the synagogue 20 years before, and had paid his rent up to the year 1810; he then seceded, and attended another synagogue, but he retained the key till the year 1813; and the present action was brought to recover the amount of the rent for that space of time, and also for certain offerings, and sums alleged to be due from him in respect of certain rites and ceremonies peculiar to the *Jewish* religion. But with respect to the latter claim, ABBOTT, J., at a very early stage of the cause, intimated his opinion, that the lessees, who were the plaintiffs in the present action, were not entitled to recover for them, since those matters were under the particular management of the officers annually appointed, and the lessees had no concern with them; and this part of the demand was accordingly abandoned by the plaintiffs.

Marryat, for the defendant made two objections against the claim for the rent of the seat. First, that the plaintiffs, who were the surviving lessees of the premises, had nothing to do with

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ISRAEL
and Others
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and Others
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the letting of the seats, or the profits derived from them. If any person wanted a seat he was to apply to the treasurer, who made the contract with him, and delivered to him the possession of the seat, without communicating the names of the lessees. There was, therefore, no privity of contract between the plaintiffs and the defendant, and, consequently, the action, founded upon a contract, could not be supported. Secondly, he contended, that the action was not maintainable in point of law, because the law of *England* did not tolerate *Jewish* synagogues. Great pains had been taken to investigate the subject, and it did not appear that there was any law which legalized the establishment of *Jewish* synagogues. The principal synagogue in this kingdom had been established under a royal grant, in the reign of *Charles* the Second; but it was not open to all people of that persuasion, without any grant or licence, to erect places of worship, according to their own pleasure, and to employ preachers at their own discretion. The toleration act did not embrace *Jewish* synagogues of any description; and since the doctrines preached there were in direct hostility to the Christian religion, such establishments were to be considered as illegal. In answer to a question from the Court, it was admitted that there was no written law which prohibited such establishments.

ABBOTT, J., was of opinion, that in point of law the contract was to be considered as made with
the

the lessees, who had the legal title to the synagogue, the seats in which had been let; and with respect to the second point, he said that since no authority could be produced to the contrary, he should certainly hold that such establishments were lawful, and consequently that the plaintiffs were entitled to recover.

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 ISRAEL
 and Others
 v.
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It afterwards appeared, that *Jacob Hart*, who was one of the original lessees, had died in the year 1814, after the time when the rent sought to be recovered had accrued, and there was evidence of an acknowledgment as to the sum due for rent, which had been made previous to the death of *Jacob Hart*. But the declaration stated, that the defendant was indebted to the plaintiffs for the use and occupation of a certain seat, &c. before then held, used, occupied, possessed and enjoyed by him, by the sufferance and permission of the plaintiffs, &c. There was also the usual count upon an account stated with the four plaintiffs; but there was no count which alleged an occupation of the seats by the sufferance and permission of the plaintiffs, and *Jacob Hart*, the then trustees. Upon the objection taken that the declaration was not supported by the evidence —

ABBOTT, J., acceded to the objection, and the plaintiffs were nonsuited.

Scarlett, Gurney, and Pollock, for the plaintiffs.
Marryat, Comyn, and Chitty, for the defendant.

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ISRAEL
and Others
v.
SIMMONS.

In the ensuing term, a motion was made to set aside the nonsuit. It was contended that the plaintiffs might declare either as surviving trustees or in their own right, since the right accrued to them by operation of law. But the Court were of opinion, that the plaintiffs had been properly nonsuited; the seats had been held, not by the permission of the plaintiffs, but by the joint permission of the plaintiffs and of another person; and —

HOLROYD, J., observed, that in the case of use and occupation by the permission of two, one of whom is dead, there are two modes of declaring; either by alleging that the defendant was indebted to both, for the use and occupation by the permission of both, or that he was indebted to one, for the use and occupation of the premises, held and enjoyed by the joint permission of both. (a)

(a) In an action *against* a surviving defendant, counts may be joined upon a demand due from the defendant upon his own contract, and another due from him as a surviving partner, and both may

be recovered upon one set of counts, charging him only in his own right. *Richards v. Heather*, 1 B. & A. 29, overruling *Spalding v. Moore*, 6 T.R. 363.

IN THE KING'S BENCH.

Sittings after Easter Term,
58 GEORGE III.

WESTMINSTER.

CARTER v. HALL.

1818

THIS was an action of assumpsit for work and labour. Pleas, the general issue and the statute of limitations.

The defendant had been the purser of His Majesty's ship *La Belle Poule*, and the plaintiff had served for more than two years as the purser's steward, and sought to recover for his services in that situation.

A purser's steward on board one of His Majesty's ships cannot recover wages from the purser, upon an implied contract, for his services as such on board the ship.

It appeared that the situation of purser's steward was one of considerable trust and trouble, the duties of the situation consisting chiefly in weighing and delivering provisions to the crew, and keeping the purser's accounts.

It appeared also that the purser's steward was a person known as such in the King's service, who could not be appointed by the steward without the assent of the commander, and that he was entitled to the pay of an able seaman from the Crown, but that he usually received pay from the purser under a private contract with him; and evidence was

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adduced

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CARTER
v.
HALL.

adduced on the part of the plaintiff, to shew that it was usual for the purser to pay the purser's steward at the rate of one pound for every gun by way of annual salary. That the purser could not discharge his duty without the assistance of a steward, and that although rated as a seaman, it was not usual to call upon him to act as such. He had both public and private duties to perform. It did not appear that any specific contract had been made in this case. The defendant had left the ship on the 8th of *November* 1811, and the declaration was entitled generally of *Michaelmas* term 1811.

It was contended on the part of the defendant, that since the purser's steward was a person known in the service, who received specific pay in respect of his services, he could not, without a special contract to that effect, recover from the purser.

For the plaintiff it was contended, that since it was the custom for the purser to employ such an agent of his own selecting, and to pay him at the rate of one pound *per* gun, which bore a reasonable proportion to the trouble and responsibility of his situation, the law would imply a contract for remuneration in the particular case, although no specific contract could be proved. It was admitted that the plaintiff was not entitled to recover for more than one year's salary, ending on the 8th of *November* 1810, since the second year's salary would not be due till the 8th of *November* 1811, and the declaration being entitled generally of *Michaelmas*

Michaelmas term 1811, would relate to the 6th, the first day of the term.

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CARTER

v.

HALL.

LORD ELLENBOROUGH said, that at first he entertained some difficulty upon the point; but, considering how very extensive the operation of the principle might be, if such an action could be supported, and if a person receiving a specific salary from the Crown, in respect of his situation, could recover upon an implied contract, for a remuneration for his services from the officer, under whose immediate authority he acted, and that the purser had no fund allowed him out of which such services were to be paid, was of opinion that the plaintiff must be nonsuited.

The plaintiff was accordingly nonsuited.

Scarlett and Turton, for the plaintiff.

Topping for the defendant.

1818.

Wednesday,
May 6th.

FOSTER v. COMPTON.

In an action by one defendant in assumpsit against a co-defendant, the *postea* is evidence to prove the amount of the damages ; but (*semble*) the indorsement of the costs, with the Master's allocatur on the *postea*, is not sufficient to entitle the plaintiff to recover half of the costs, without producing the judgment.

THIS was an action by the plaintiff to recover for money paid to the use of the defendant.

An action of assumpsit had been brought in a former cause against the present plaintiff and defendant, in which they had defended, by separate attornies and by different counsel, and a verdict had been obtained against them to the amount of 70*l*. The costs were afterwards taxed, and the damages and costs amounted to 137*l*. 10*s*., and the present plaintiff's attorney, after having requested the attorney of the plaintiff in the former cause to take half that sum as the present plaintiff's share of the costs, paid the whole, to prevent execution from being taken out, and the present action was brought to recover one half of that sum.

On the part of the plaintiff the *postea* in the former cause was offered in evidence, with the Master's allocatur indorsed upon it.

On the part of the defendant it was objected, that the *postea* was not evidence, and that it was necessary to prove the judgment, which was the only legitimate mode of proving the liability of the party, either as to the damages or the costs. The *postea* was not evidence as to the damages, since it was possible that judgment might have been arrested,

rested, and the act of the Master in taxing costs was an act merely inchoate, and not binding upon the party before the judgment. This was evident from the usual entry, according to which the costs were awarded by the Court, with the consent of the plaintiff.

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FOSTER

v.

COMPTON.

On the part of the plaintiff it was contended, that the *postea* was, at all events, admissible to prove that a verdict had been obtained to that amount, and that the objection was founded upon a misconception of the nature of the action. If no action had been brought, either of the parties jointly liable might have paid the debt, and would have been entitled to recover one half of the amount from the other; and upon the same principle, with a view to some further expence, either of them might interfere at any time, and pay the damages and the costs already incurred.

ABBOTT, J., doubted whether the proof was sufficient as to the costs, but permitted the plaintiff to take a verdict for the whole of his claim, with liberty to the defendant to move to have the damages reduced to the sum of 35*l*.

Verdict accordingly.

Scarlett and *Pollock*, for the plaintiff.

Gurney and *Taddy*, for the defendant.

1818.

Wednesday,
May 6th.

COWLING v. ELY.

Where a minor sues by his guardian, the declaration of the guardian is not evidence against the plaintiff.

THIS was an action by the plaintiff, who being a minor, sued by one *Sanderson*, (who was her step-father,) as her guardian, for slanderous words spoken of her by the defendant.

In the course of the cause a witness was examined as to declarations relating to the subject made by the guardian of the plaintiff, and it was contended that these were evidence, since he was liable to costs; but —

ABBOTT, J., was clearly of opinion, that the declaration of the guardian was not admissible in evidence against the plaintiff.

Monday,
May 18th.

REX v. MERCERON.

The evidence which a person has given before a Committee of the House of Commons, is afterwards admissible against him on a criminal charge.

THIS was an indictment against the defendant, who was a magistrate for the county of *Middlesex*, for misconduct in his office, in having corruptly and improperly granted licences to public houses which were his own property.

In the course of the evidence for the prosecution, it was proposed to prove what had been said by the defendant in the course of his examination before

before a committee of the House of Commons, appointed for the purpose of enquiring into the police of the metropolis. The defendant had been compelled to appear before this committee, and had, upon examination, delivered in a list of certain public houses, with the names of the owners, &c.

1818.
—
REX
v.
MERCERON.

On the part of the defendant it was objected, that since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of that House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant ; but—

ABBOTT, J., was of opinion that the evidence was admissible.

The defendant was afterwards found guilty.

Scarlett, Gurney, and Wylde, for the prosecution.

Topping, Knowlys, C. S. and Richardson, for the defendant.

1818.

Monday,
May 18th.

GUILDHALL.

WATKINS v. VINCE.

Evidence that the son of the defendant, a minor, has in three or four instances signed bills of exchange for his father, is sufficient, in an action against the father on a guarantee, to warrant the reading of an instrument, purporting to be a guarantee by the father in the hand-writing of the son.

THIS was an action on a guarantee by the defendant, by which, as was alleged, he had guaranteed to the plaintiff the payment for 100,000 bricks, to be supplied to one *Hampson*.

The guarantee was in the hand-writing of *James Vince*, the son of the plaintiff, a minor of the age of 16. It was proved that he had signed for his father in three or four instances, and that he had accepted bills for him.

Gurney for the defendant objected, that this was too slight evidence of authority given to the son to warrant the receipt of the guarantee in evidence against the father; but—

Lord ELLENBOROUGH held, that this was sufficient *primâ facie* evidence, in the absence of any inducement on the part of the son to commit a crime.

Gurney afterwards objected, that such a guarantee required a stamp; but—

Lord ELLENBOROUGH overruled the objection, the guarantee being a contract relating to the sale of goods, and therefore within the exception in the statute.

Verdict for the plaintiff.

Topping and *V. Lawes*, for the plaintiff.

Gurney, for the defendant.

1818.

FARREN and Another v. RICHARDS and Another. May 18th.

THIS was an action by the plaintiffs as the indorsees, against the defendants as the acceptors, of a bill of exchange for the sum of 546*l.* 12*s.* 6*d.*

When the cause was called on in its regular order, as a common jury cause, it was stated by the defendant that a special jury had been moved for, but that no steps had been taken to reduce the jury, because, according to the common course, the cause would not be tried by a special jury before the sittings after *Trinity* Term.

Lord ELLENBOROUGH said, that since no special jury had been struck, it was competent to the plaintiff to try the cause at his peril.

The plaintiff accordingly proceeded, and obtained a verdict for the full amount of the bill, no defence being attempted.

If a defendant who has obtained and served a rule for a special jury, take no further steps upon it, the plaintiff will be entitled to have the cause tried in its regular order, as a common jury cause, and the Court will not afterwards relieve the defendant, except under very special circumstances.

In the ensuing term a motion was made to set aside the verdict. It was stated that the rule for a special jury had been obtained on the 5th of *May*, when the rule was served, but that no further step was taken till *Saturday, May* the 16th, when the defendant was served with notice of trial for *Monday*, when it was too late to make effectual preparation for defence.

The

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FARREN
and **Another**
v.
RICHARDS
and **Another.**

The Court said, that it was incumbent upon a party who meant to have his cause tried by a special jury, to pursue the object in all its steps, and to do every thing in his power in order to enable the other party to apply to the Judge at *Nisi Prius* to try the cause, upon a statement that it would occupy no more time than a common cause; but since the defendant produced an affidavit of merits, and suggested, that if a new trial were not granted, the plaintiff would retain a verdict for a sum far exceeding his just demand, the Court granted the rule, on the defendant's undertaking to pay the money into court.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings in Trinity Term,

58 GEORGE III.

WESTMINSTER.

SYMMONS v. WANT.

1818.

May 27th.

THIS was an action of assumpsit upon a guarantee by the defendant.

It appeared that *Thomas Want* the brother of the defendant was a schoolmaster, and that he had entered into an agreement with the plaintiff, dated *May* the 2d, 1817, by which the plaintiff agreed to let to him from the half-quarter next ensuing, the use of the galleries of the Chapel, No. 6. *Edward-Street, Soho*, for a school during the week days, at

In an action on a guarantee, the plaintiff gives in evidence a letter in the handwriting of the defendant, but without date, in which the latter states, "I have no objection to a guarantee"

"the payment of the rent, as far as that of each quarter, during Mr. *T. Want's* continuance in possession." He also proves that *T. Want* rented certain premises from him. This is not sufficient, without shewing that the plaintiff accepted the defendant's offer.

the

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SYMMONS

v.

WANT.

the rent of 20*l.* *per annum* for the first year, and 25*l.* *per annum* afterwards, by four regular quarterly payments, at the usual days of payment. It was also proved that the following document was in the hand-writing of the defendant: it was directed to the plaintiff, but had no date.

“ Sir, — I have no objection to guarantee the payment of the rent as far as that of each quarter, during Mr. *T. Want*’s continuance in possession, but you must see that no arrears of rent accrue.”
Signed, “ *J. Want.*”

It was proved that *Thomas Want* occupied the premises from *May* till the middle of *August*, when he left the place, and had not since been heard of. The defendant had not been called upon to pay the rent, and had received no notice of the default, till the following *November*.

Hutchinson, for the defendant, objected, that the plaintiff was not entitled to recover. 1st, Because the supposed guarantee contained no reference to the terms of the written agreement between the plaintiff and *Thomas Want*; and he contended that the connection could not be proved by parol on the authority of *Boydell v. Drummond* (a), which he contended was not so strong as the present, because there the signature was entered by the defendant, in a book entitled “ *Shakspeare Subscribers*,” and a written pro-

(a) 11 East, 142.

spectus was delivered at the same time to the subscribers. He also cited *Clinan v. Cooke*. (a) 2dly. That the terms “ I have no objection to guarantee” did not amount to a guarantee, in the absence of evidence of a request to guarantee, or of an acceptance of the offer to guarantee; and he cited *M'Iver* against *Richardson* (b), where it was held that the instrument was not a guarantee, but merely an offer to guarantee, which did not become an absolute guarantee, without an acceptance of it as such. 3dly, That there was no consideration sufficiently expressed on the face of the guarantee, and therefore that the case was within the principle of *Wain v. Warlters*. (c) 4thly, That according to the terms of the instrument the defendant was entitled to have had earlier notice of the default of the principal.

1818.
 SYMMONS
 v.
 WANT

HOLROYD, J., having called upon the counsel for the plaintiff to answer the second objection; and to state upon what count of the declaration they founded their claim,

Gurney and *Chitty*, for the plaintiff, answered, that they relied on the 3d count in the declaration, which set forth a request by *Thomas Want* to the plaintiff, to sign the agreement already referred to, and then alleged that the defendant, in consideration that the plaintiff would sign the agreement, undertook to guarantee, &c. and that the plaintiff

(a) 1 Schoales & Lefroy, 22. (b) 1 M. & S. 557. (c) 5 East, 10.

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SYMMONS

v.

WANT.

confiding, &c. did sign the said agreement. And they contended that the terms of the letter proved that it was in answer to an application to the defendant to guarantee the rent, and that it was written anterior to the agreement ; but —

HOLROYD, J., was of opinion that the plaintiff had not established a sufficient case. The letter itself being without date, it did not appear whether it was written before or after the agreement was entered into, and therefore the plaintiff had not proved the consideration as stated in the declaration ; and he was of opinion that the doctrine laid down by Lord *Ellenborough* in *M'Iver* against *Richardson*, was applicable to the present case. Accordingly he directed a nonsuit, with leave to the plaintiff to move to set it aside, and enter a verdict for the plaintiff.

Gurney and *Chitty*, for the plaintiff.

Hutchinson, for the defendant.

IN THE KING'S BENCH.

At the First Sitzings after Trinity Term.

WESTMINSTER.

1818.

SMITH and his Wife, Administratrix of EASTLING, Thursday,
v. NIGHTINGALE. June 11.

THIS was an action by the plaintiffs in right of the wife, as administratrix of *James Eastling*.

The declaration contained a count upon a promissory note alleged to have been made by the defendant, on the 12th of *October* 1807, for the payment of 64*l.* to *James Eastling*, payable three months after the date: the declaration contained also the money counts, and a count upon an account stated.

It appeared that *Eastling* had been employed by the defendant as a servant in husbandry, and that the defendant having in his hands monies belonging to *James Eastling*, gave him the following promise in writing, upon which the first count in the declaration was founded.

“ *October* 12. 1807.

“ I promise to pay to *James Eastling*, my head
carter, the sum of 65*l.* with lawful interest for the
c c 2 same,

An instrument by which the party promises to pay the sum of 65*l.*, and also such other sum as, by reference to his books, he owed to another, with interest, cannot be considered as a promissory note, even as to the 65*l.*, and cannot be given in evidence under the count upon an account stated, without an agreement stamp.

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same, three months after date, and also all other sums which may be due to him.”

On the part of the defendant it was objected, that this instrument could not be considered as a promissory note, since it was not made for the payment of any certain sum, and that it could not be given in evidence under the count upon an account stated, since it was an agreement, and for a larger sum than 20*l.*, and ought to be stamped.

Gurney, for the plaintiff, contended, that it was certain to the extent of 65*l.* and therefore that to that extent the plaintiff was entitled to consider it as a promissory note; but that, at all events, it was evidence of an account stated, and that no stamp was essential to a mere acknowledgment of a debt; but—

Lord ELLENBOROUGH was of opinion, that the instrument was too indefinite to be considered as a promissory note: it contained a promise to pay interest for a sum not specified, and no otherwise ascertained than by reference to the defendant's books; and that since the whole constituted one entire promise, it could not be divided into parts. He also held, that since the instrument contained an agreement to pay the money, it could not be received in evidence as an acknowledgment without a stamp.

Gurney

Gurney then offered in evidence a letter written by the defendant to the sister of the plaintiff, dated *July 2. 1817*, in which the defendant expressed his surprise that one *Newcomb* had not paid the sum of 39*l.* at Doctor's Commons for the plaintiff, since he had given him the money for that purpose; and added, that until that sum was paid he would pay interest for it.

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It was also objected to this evidence, that since the letter contained an undertaking to pay interest for the money, an agreement stamp was necessary; and —

The plaintiff was nonsuited.

Gurney and *Shutt*, for the plaintiff.

E. Lawes, for the defendant.

HILL v. WARREN.

Thursday,
June 11.

THIS was an action on the case by the plaintiff, who was the owner of a house in *Great War-dour-Street*, against the defendant, the owner of an adjoining house, for so negligently taking down his house that the plaintiff's house was much injured.

In an action against the defendant for the negligence of his agent in pulling down the party-wall between the houses of the

plaintiff and defendant, it is a good defence to shew that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame.

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HILL

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WARREN.

It appeared that the parties had, previous to the pulling down the defendant's house, referred themselves to two arbitrators, who had awarded that the defendant should be at liberty to begin to take his house down, on giving ten days' notice instead of giving a notice of three months, according to the provisions of the building act. The plaintiff was tenant of the house, under Lord *Arundel*, who, at the instance of the plaintiff, interfered in the matter; and in consequence of such application, Lord *Arundel's* agent and the defendant each appointed workmen to pull down the old party-wall, and to re-build it. The wall was accordingly pulled down by the joint agents, but for want of properly shoring up the back front of the plaintiff's house, it was considerably injured, and was in so dangerous a state, that the plaintiff and his family were obliged to leave it for some time.

It was objected on the part of the defendant, that the agents who conducted the work were appointed by the plaintiff jointly with the defendant, and that the latter was not liable for negligence in which the plaintiff's own agent was equally implicated; and —

Lord ELLENBOROUGH was of opinion, that it was not competent to the plaintiff to attach that blame to the defendant which was the common blame of both; and that since the wall had been taken down
by

by both, neither could impute negligence to the other.

Plaintiff nonsuited.

1818.

HILL

v.

WARREN.

Scarlett and Comyn, for the plaintiff.

Gurney and Manning, for the defendant.

THOMSON v. WILSON.

June 11.

THIS was an action for use and occupation. The defendant had pleaded the general issue as to all except 3*l.* and a tender of that sum, which was denied in the replication.

It appeared that the defendant, on the 24th of May 1816, became the tenant of several rooms in the plaintiff's house, at the rent of 36*l. per annum*, payable quarterly, and that he had continued in the actual occupation of them for the first quarter, and during some weeks of the second quarter. The defence was, that the parties, during the second quarter, having had a quarrel, went before the sitting magistrate at *Marlborough-Street*, and, upon the recommendation of the magistrate, had come to a mutual resolution to put an end to the tenancy, the plaintiff agreeing to receive rent in proportion to the part of the second quarter which was then elapsed. It appeared that the defendant then quitted the premises, and that he had tendered the sum of 3*l.* as due for the proportional part of the quarter then elapsed, and had tendered the key, but that the plaintiff had refused to re-

The defendant being tenant to the plaintiff of certain rooms in his house, at a rent payable quarterly, a mere parol agreement in the middle of a quarter to determine the tenancy is not binding.

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v.

WILSON.

ceive either; upon which the defendant left the key behind him at the plaintiff's.

Marryat for the plaintiff contended, that this was insufficient, and that it was not competent to the defendant to prove a surrender of the existing term, without a note in writing, as required by the Statute of Frauds (*a*); and he cited the case of *Mollett v. Brayne* (*b*), where this point had been so decided by Lord *Ellenborough* at Nisi Prius.

Topping, for the defendant, attempted to distinguish the present case from that of *Mollett v. Brayne*, but —

LORD ELLENBOROUGH was of opinion that the cases could not be distinguished, and said that he recollected a case at *York* where Mr. Justice *Wilson* had ruled the same point, and accordingly the plaintiff had a verdict for 6*l.*, the balance due for the second quarter.

Marryat, *E. Lawes*, and *Starkie*, for the plaintiff.

Topping and *Reader*, for the defendant.

(*a*) 29 C. 2. c. 3. s. 3.

(*b*) 2 Campb. 103.

PARKINS and Another v. HAWKSHAW.

1818.

June 13.

THIS was an action brought by the plaintiffs on a bond, with a penalty of 500*l*. The condition was, that the defendant should pay to the plaintiffs, who were dealers in coal, the amount of the value of the coals which the plaintiffs should from time to time sell to one *Keucher*. The declaration alleged, by way of breach, that the plaintiffs had delivered coals to *Keucher* to the amount of 250*l*. of which the defendant had had notice, but had refused to pay the same.

Upon *non est factum* pleaded to a bond for the performance of certain conditions, breaches of which are assigned in the declaration, the jury who try the issue may assess the damages under the common *venire*.

The defendant had pleaded *non est factum*, and the common *venire* appeared on the record to have been awarded in the usual form; “therefore let a jury thereupon come before our Lord the King at *Westminster*, on, &c. by whom, &c. and who neither, &c. to recognize, &c.,” and there was no special *venire* as in the case of an inquiry.

The defendant’s execution of the deed having been proved, when the counsel for the plaintiffs were about to call witnesses to prove the breach, as stated in the declaration, a doubt occurred whether, as the record stood, the jury had any authority to assess the damages upon the breach as alleged.

The counsel for the plaintiff submitted that the present jury were competent to assess the damages under the statute 8 and 9 *W. 3. c. 11. s. 8.*, which directs,

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directs, that in all actions in any of His Majesty's courts of record upon any bond, or on any penal sum for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit; and the jury, upon trial of such action, shall assess not only such damages and costs as have been usually done, but also damages for such of the said breaches as the plaintiff shall prove.

ABBOTT, J., said, that he recollected a case where it was so contended on the Western Circuit, and that he thought the form of the record was correct.

The plaintiffs accordingly proceeded with their evidence, and had a verdict for 250*l*.

Campbell and *E. Larwes*, for the plaintiffs.
 The cause was undefended.

Saturday,
 June 13.

LATOUR v. BLAND and Another.

Evidence that the plaintiff, in an action for pirating a musical work, ac-

THIS was an action against the defendant for having on the 22d day of *May* in the year 1816, and on divers days afterwards, published a quiesced in the defendant's publication of it six years ago, does not prove that the plaintiff has transferred his interest in the copyright. — A receipt given by the plaintiff for money received by him as the price of the copyright, will not preclude the plaintiff from maintaining the action.

sonata

sonata called, “*Le Retour de Windsor*,” and sold copies of it, in which the plaintiff claimed a copyright as the composer.

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v.

BLAND
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This piece of music had been composed by the plaintiff *Latour* as long ago as the year 1801, and it appeared that in the year 1812, and previously the defendants had sold copies bearing *Latour*’s name as the composer, and that this had been done with the acquiescence of the plaintiff.

Topping, on the part of the defendant, contended, that since the plaintiff had acquiesced in the former publication, it was to be presumed that he had legally transferred his interest in the copyright, and consequently that the present action could not be maintained; but —

ABBOTT, J., was of opinion, that although from the publication so long ago as the year 1812, without any complaint having been made, it might be inferred that the defendant had authority from the plaintiff to publish at that time, yet that it was impossible to infer for what time that authority might have been given, and whether it subsisted at the time of the publication of which the plaintiff complained in the present action.

Evidence was afterwards given on the part of the defendant, for the purpose of proving that the whole of the plaintiff’s interest in the copyright had been transferred to the defendants. A witness stated,

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stated, that 10 years ago the plaintiff had given a receipt (which had since been destroyed), to the defendants for the sum of 31*l.* 10*s.*, as the consideration for the purchase of the copyright by *Bland* and *Weller*, from the plaintiff, but that there was no other writing than the receipt. And that the plaintiff had afterwards said that he ought to have had more for the copyright.

It was objected, for the plaintiff, that this was not sufficient evidence of assignment of the copyright, since the stat. 8 *Ann. c.* 19. requires that the assignment shall be in writing, and attested by two witnesses.

Topping contended, that the declaration made by the plaintiff was evidence against himself, to shew that he had parted with the copyright by competent means ; and he referred to the case of *Moore v. Walker (a)*, where Lord *Ellenborough* had nonsuited the plaintiff, who was the author of the work, upon his declaration that he had parted with all his interest in the copyright of the work ; but —

ABBOTT, J., was of opinion, that there had not been any assignment. In the case of *Moore v. Walker*, the author had admitted that he had assigned his interest, but here it appeared in evidence that there had not been any assignment such as the statute required. By the act of *Anne*, which was made for the encouragement of genius and learn-

(a) 4 Campb. 9.

ing, an exclusive right had been given to the author of any work for the term of 14 years; and he might, during that term, assign his interest to another, and if he died without assigning his copyright, the interest would go to his executors. If he survived the term of 14 years, he would be entitled to the enjoyment of the copyright for 14 years more. A question might perhaps be made, whether an assignment within the first 14 years would carry the contingent interest; but here no such question arose, since there had been no assignment according to the mode pointed out by the statute.

Verdict for the plaintiff for the sum of 100*l.*, the plaintiff undertaking to convey the copyright.

Scarlett and Comyn, for the plaintiff.

Topping and Chitty, for the defendant.

TUCKER *v.* CRACKLIN.

Saturday,
June 13.

THIS was an action of assumpsit against the defendant, to recover damages for the loss of two boxes containing candles.

A principal question was, whether there was not a variance between the declaration and the evidence, as to the terminus from which the goods were to be carried.

The first count alleged that the defendant was a common carrier of goods and merchandise for hire, in and by a certain waggon or cart, from (among other places) *Whitechapel*, in the county of *Middlesex*,

In an action of assumpsit against a carrier for the loss of goods, where a contract is alleged to carry them from A. to B. a variance in evidence as to the *termini* is fatal.

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CRACKLIN.

sex, to *Brentwood*, in the county of *Essex*, to wit, at *Westminster*, in the county of *Middlesex*; and that the said defendant being such carrier as aforesaid, the said plaintiff, on, &c. at a certain house or inn called or known by the name or sign of the *Blue Boar*, in *Whitechapel* aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid, at the special instance and request of the said defendant, caused to be delivered to him the said defendant divers, to wit, two boxes, &c. addressed and directed to and for the Right Honourable Lord *Petre*, at *Thornden*, in *Essex*, to be taken care of, and safely and securely carried and conveyed by the said defendant as such carrier as aforesaid, in and by the said waggon or cart, from the said inn, to *Brentwood* aforesaid; and there, to wit, at *Brentwood* aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff, for the purpose of the same being from thence, to wit, *Brentwood* aforesaid, sent and delivered to and for the said Lord *Petre*; and in consideration thereof, and of a certain reward to him the said defendant in that behalf, he the said defendant, being such carrier as aforesaid, then and there, to wit, on, &c. at, &c. undertook and faithfully promised the said plaintiff to take care of the said boxes and their contents, and safely and securely to carry and convey the same in and by the said waggon or cart, from the said inn to *Brentwood* aforesaid, and then and there, to wit, at *Brentwood* aforesaid, safely and securely to deliver the same for the said plaintiff, &c.

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The 2d count, in similar terms, alleged an undertaking on the part of the defendant, to carry the boxes *from Whitechapel aforesaid, to Thornden* in the county of *Essex*.

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A 3d count alleged an undertaking, founded upon an executed consideration, to carry the goods safely from *Whitechapel aforesaid, to Brentwood aforesaid*.

Evidence was adduced by the plaintiff, the tendency of which was to shew that the goods had been delivered at the *Blue Boar, in Aldgate High-Street*, within the city of *London*, which was the inn from which the defendant was accustomed to carry goods.

Marryat, for the defendant, objected, that this was a fatal variance, since the contract had been improperly described.

It was answered on the part of the plaintiff, that it was unnecessary to state or to prove the *termini* with particularity, and that under an allegation that the goods were to be carried from *A. through B. to C.*, it would be sufficient to prove that they were to be carried from *B. to C.* and that in the 2d and 3d counts, *Whitechapel* was alleged as the *terminus a quo*, which might be considered as including *Aldgate*. The case of the (a) Company of Proprietors of the *Mersey and Irwell* Navigation

(a) 2 East, 497.

v. *Douglas*,

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v. *Douglas*, was referred to, and also the case of *Frith v. Gray* (a), in the note, where in an action on the case upon an agreement, that the Defendant would procure the plaintiff a booth at the horse-race, upon *Barnet* common, in the county of *Middlesex*, it appeared that *Barnet* common was in the county of *Hertford*, and it was held that the variance was not material.

ABBOTT, J., was of opinion, that the variance was fatal. The description of the *terminus* in the 2d and 3d counts, was from *Whitechapel* in the county of *Middlesex*, and *Aldgate* was in *London*. If the description of one end of the line was not material, the description of the other end would not be material, and, consequently instead of describing a contract to carry goods from *Aldgate* to *Brentwood*, it would be sufficient to allege a contract to convey them from any one place, to any other place in the kingdom, without any regard to the facts. In the first of the cases cited, the action was in tort and not in contract, and great doubt might be entertained as to the soundness of the other authority which had been referred to.

Plaintiff nonsuited.

In the course of the cause, the question arose whether in an action of *assumpsit* against a carrier for the loss of goods, it was incumbent on the plain-

(a) 4 T. R. 361.

tiff to give evidence, to shew that the goods had never arrived, or the defendant was bound to shew that they had been delivered.

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CRACKLIN,

Scarlett, for the plaintiff, contended, that he was not bound to adduce such proof.

ABBOTT, J., considered it as a question for the jury upon such evidence as the plaintiff had adduced upon that point, but the plaintiff was nonsuited as already stated on the ground of variance.

Scarlett, and *Chitty*, for the plaintiff.

Marryatt and *Comyn*, for the defendant.

BROOKS v. WARWICK.

Monday,
June 22.

THIS was an action on the case, for maliciously charging the plaintiff with having in his possession a forged Bank of *England* note, knowing the same to be forged, and causing him upon that

A. takes a bank-note in the course of his business, which he pays to B., the note is afterwards

stopped at the bank as a forged note, and is brought by an inspector to A. who immediately pays to B. the amount of the note, and refuses to give it up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he received it. The inspector, in the absence of all circumstances of suspicion, is not justified in charging A. before a magistrate with feloniously having the note in his possession, knowing it to be forged, for the purpose of compelling him to give up the note. — By possession, under the st. 45 G. 3. c. 89., is meant the original possession of a note acquired in an illegal mode, and not a subsequent possession like the above, where the original possession was legal.

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charge to be taken before *Robert Baker*, Esquire, a magistrate, and causing him to be imprisoned, &c.

The plaintiff was a pawnbroker and silversmith, and in the course of his business, *Bennett* his servant had received from a person of the name of *Gaubold*, the note in question, which had been paid in order to redeem a pledge, *Bennett* at the time the note was so paid, wrote upon it the name of *Gaubold* from whom he received it, and also his place of residence, No. 4. *Tavistock-Street*. It was his usual course to indorse upon every note the name of the person from whom he received it. Soon after this, the plaintiff paid the note to Mrs. *Bull*, and she also paid it away, and the note was afterwards taken to the bank, and there detained as a forged note, and the word *forged* was stamped upon it in three different places, in large characters. The defendant, who was one of the inspectors of the Bank of *England*, in *December* 1816, brought the note to the plaintiff's shop, and asked him from whom he had received the note, which he produced, with the word *forged* stamped upon it. *Bennett* immediately recognised the note as having been received by him from *Gaubold*, and the plaintiff immediately took it to Mrs. *Bull*'s, and having shewn it to her as the note which he had passed to her, paid her the amount. The plaintiff and defendant afterwards returned to the plaintiff's shop, and the defendant then required that the note should be returned to him, this, however, the plaintiff refused to do, saying, that he wished to trace it back to

to the person from whom he took it, but undertook that it should be forthcoming when it was wanted for the purposes of justice. The defendant then threatened the plaintiff with a prosecution, in case he did not give up the note. The defendant afterwards applied to Mr. *Baker* a magistrate, and a letter was sent by the magistrate's clerk to the plaintiff, requiring him to give up the note; the plaintiff still declined to part with it, and afterwards appeared before the magistrate in consequence of a summons from him, and was then charged by the defendant with feloniously having a forged note in his possession, knowing it to be forged. The plaintiff insisted upon his right to detain the note, and stated as a reason that it might be useful to him in order to enable him to detect other forgeries, by comparing them with that note.

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The magistrate was of opinion, that by detaining the note, the plaintiff would be guilty of felony within the statute; but proposed to the plaintiff, for the purpose of enabling him to try the question with the bank, that he should be committed to the custody of a peace-officer for five minutes, and that then on giving up the note he should be discharged; he also offered to admit him to bail. On the part of the plaintiff it was also stated, both then and before the plaintiff had been taken before the magistrate, that if the note was given up, no further steps would be taken. The plaintiff having declined these proposals, was committed by the magistrate to prison on a charge of felony, in

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having a forged note knowingly in his possession without lawful excuse. The plaintiff remained in confinement till the next day, and having been again brought before the magistrate, was discharged upon the note's being delivered up into the magistrate's possession, who had ever since kept it sealed up. It did not appear that the officer of the bank had since that time taken any steps towards tracing the forged note.

LORD ELLENBOROUGH, in a very early stage of the cause, intimated his opinion, that the defendant, as an officer of the Bank, had gone too far in charging the plaintiff with felony, and thought that the plaintiff was entitled to a verdict, and suggested the propriety of the plaintiff's taking a verdict, with nominal damages, which the plaintiff was willing to accept ; but the offer was declined on the part of the defendant.

It was contended on his part, that the action could not be supported, since there was evidence of probable cause for making the charge, and no evidence to prove malice. The defendant acted as an inspector ; he had never seen the plaintiff before, and therefore could not have been actuated by any motive of personal hostility. The note had been stopped at the bank as a forged note ; but although the word *Forged* had been stamped upon it, the mark was not indelible, and the note might be afterwards made use of for improper purposes. The plaintiff, it appeared, knew that the note was a forged one, since, after the fact of its being a forgery

forgery had been communicated to him, he had given Mrs. *Bull* the value of the note. The note being in the custody of the officer of the bank, who had placed it in the hands of the plaintiff, merely for the purpose of inquiring whether it had passed through his hands, the plaintiff was bound to return it; and his keeping it, and preventing further inquiry, was in itself a ground of suspicion. The plaintiff could not retain the note, unless it were to be laid down as law, that every person to whose possession a forged note was traced, had a right to keep it.

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Lord ELLENBOROUGH, in the course of the cause, more than once intimated his decided opinion, that the conduct of the defendant, in point of law, could not be justified. The possession, which was made felonious by the statute, was to be understood of an original possession of a note obtained by unlawful means. This he considered to be so clear, that to press a commitment, under circumstances like the present, was such a *crassa ignorantia*, that it amounted to malice. No circumstances of fraud, or misrepresentation of any kind, on the part of the plaintiff had been proved: his was the common case of taking a note in the usual course of carrying on business. If the possession of a note, under these circumstances, which turned out to be forged, could be deemed criminal, every one who took a note would take it with a halter about his neck. His Lordship afterwards left it to the jury to say, whether, under all the circumstances of the case,

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there existed any probable ground to warrant the defendant in making such a charge. If any thing had been done on the part of the plaintiff to warrant reasonable suspicion that the note had originally come into his possession for an improper and illegal purpose, the defendant would be entitled to their verdict ; but if, on the other hand, the plaintiff had done no more than any other man would naturally have done to secure his own interest, and had been guilty of no disguise, concealment, or misrepresentation, then there was no probable ground for preferring a charge against the plaintiff, of his having obtained possession of the note feloniously ; and they ought to find a verdict for him. The note, it appeared, had been paid in the usual course of business, and when applied to by the defendant, he had withheld no information. It was to be presumed, that he had received it from *Gaubold*, as he had stated ; for if he had not, or if there had been no such person as *Gaubold*, evidence to that effect, would, no doubt, have been adduced on the part of the defendant. The plaintiff had paid the note to Mrs. *Bull*, and when it came again into his possession he had paid the amount to her ; he had, therefore, an interest in the possession of the note. The Bank of *England* had then no authority to take the note out of his hands. If he had been guilty of any misrepresentation, there might have been some reason for supposing that the note came illegally into his hands ; but otherwise, he had a right to keep it till there was some authority to take it from him. The Bank of *England* had every

every possible means of acquiring information, and if they did not avail themselves of those means, its officers were responsible for the errors which they committed. Although the agents of the Bank of *England* might have fallen into a common error with the magistrate on the subject, that would not supply any probable cause for making the charge. When the note came again into the possession of the plaintiff, without any stipulation on his part to return it, he had a property in it, or at least a possession of it, of which the bank had no right to deprive him. There could, indeed, be no such thing as property in a forged note. In a case before Lord *Mansfield*, it had been so held; and if a forged note had been tendered at the bank, the bank might, possibly, have been justified in destroying it, on the ground that it was competent to any one to destroy it as a nuisance. In the case before Lord *Mansfield*, it had been contended that the plaintiff was, at least, entitled to recover the value of the paper; but Lord *Mansfield* disposed of that point, by leaving it to the jury to say, whether they could find that it was worth the amount of the smallest denomination of *English* coin. His Lordship, after commenting very fully upon all the facts of the case, left it to the jury say, whether there had been any probable cause for the charge.

Verdict for the plaintiff, damages 50*l*.

Scarlett, Broderick, and Chitty, for the plaintiff.

Topping, Gurney, and Bosanquet, Serjt., for the defendant.

1818.

Tuesday,
June 23.

EDWARDS v. BRIDGES and Another.

Although A. cohabits with B., and assumes his name and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture, being her property, is not liable to be taken under an execution against B.

THIS was an action by the plaintiff against the defendants for breaking and entering her house, and taking her goods, &c.

The defendants, as sheriffs of *Middlesex*, had seized and sold the goods under a writ of execution against the goods of one *Salmon*. It appeared that the greatest part of the goods which had been seized and sold had formerly belonged to the late husband of the plaintiff. After his death *Salmon* took the house in which the goods had been seized, and had lived there for some time with the plaintiff, who passed as his wife. It also appeared, that when the officer went to the house to levy, as he supposed, upon the goods of *Salmon*, the plaintiff represented herself to be his wife, but, before the seizure and sale, claimed great part of the goods as her own property.

It was contended, on the part of the defendants, that since *Salmon* had remained in the visible possession, and as the ostensible owner of the goods, and since the plaintiff had represented herself to be his wife, she could not now complain that the goods had been seized under an execution against him ; but —

ABBOTT, J., was of opinion, that, in point of law, the circumstance of the plaintiff's having lived with
Salmon

Salmon as his wife, and having answered to his name, did not render them liable to an execution against him, and therefore that the only question was as to the value of the goods. (a)

Verdict for the plaintiff, damages 120%.

Marryatt and Richardson, for the plaintiff.

Topping and Holt, for the defendants.

(a) This case and others of a similar nature, seem to turn upon a distinction on the subject of admissions and representations made by the party against whom the evidence is offered, which has been adverted to in a former note, *viz.* where the party by his representation obtains credit or acquires an advantage, as against the person who afterwards insists that he is bound by such representation, his admission is *conclusive*; but where no such credit is given or advan-

tage derived, and there is no breach of faith in receding from the representation so given, then, although it is evidence of the fact against the party who made it, it is not conclusive evidence.—— If, in the above case, *Salmon* had become bankrupt, the question as between the plaintiff and his assignees would have been very different; they would probably have been entitled to the property under the st. 21 J. 1. c. 19. s. 11. See *Mace v. Cadell*, Cowp. 232.

1818.

EDWARDS

v.

BRIDGES
and Another.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Adjourned Sitzings after Trinity Term,

58 GEORGE III.

GUILDHALL.

1818.

Monday,
June 29.

WRIGHT v. HAY.

The drawer and payee of a bill of exchange, after it has become due, indorses it to B., on condition that he will take up certain bills discounted by the payee. B. does not take up the bills, but transfers the bill in question to C., the latter may recover against the acceptor;

THIS was an action by the indorsee against the acceptor of a bill of exchange, dated *November* 1815, for the payment of 258*l.* to the order of the drawer, three months after date.

On the part of the defendant, *Jeffries* the drawer and indorser of the bill was called, who stated that the defendant was indebted to him to the amount of the bill, and that he had given him time for payment by three instalments of 86*l.* each, one of which had been paid, and the others had not become due ; that being indebted to a person of the name of *Buckly* in the sum of 130*l.* and upwards, he

he had indorsed the bill to him eleven months after it had become due, as a security ; informing him, at the same time, of the indulgence granted to the defendant, *Buckly* undertaking to pay certain bills which had been discounted by *Jeffries*, which he had afterwards omitted to do.

1818.
 WRIGHT
 v.
 HAY.

The plaintiff claimed as the indorsee of *Jeffries* ; and, upon cross examination, it appeared that the stipulation for giving time to the defendant was in writing, and it was not produced.

On the part of the defendant it was contended, that since the bill was placed in *Buckly*'s hands by way of security, and upon a condition which he did not perform ; and since the indorsement had been made after the time when the bill became due, the plaintiff could not recover. It was also insisted that the plaintiff could not recover, since the extended time granted to the defendant had not expired ; but —

ABBOTT, J., was of opinion, that the plaintiff was entitled to recover : since the agreement was in writing, and had not been produced, it was the same thing as if there had been no agreement.

Verdict for the plaintiff.

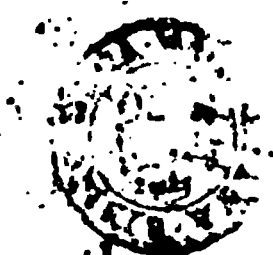
Scarlett and *V. Lawes*, for the plaintiff.

Topping and *Campbell*, for the defendant.

1818.

Monday,
June 29.

SIDAWAYS and Another v. TODD and Another.



A. deposits goods in the warehouse of B., a wharfinger, for the purpose of sale by B., who is paid 10*l.* *per annum* for warehouse rent, and receives a commission on the sale. B. having insured the goods, which are afterwards burnt in the warehouse, and having received the amount from the insurer, is liable to A. for so much money had and received to his use.

—
A. deposits goods in the warehouse of B., a wharfinger, and pays an annual rent for part of a

particular warehouse, B. removes the goods into another warehouse, where they are burnt: *qu.* whether B. is liable to A. for the amount.

THIS was a special action of assumpsit against the defendants, who were wharfingers, for having improperly and negligently removed 97 bags of nails belonging to the plaintiffs from the warehouse in which they ought to have been kept into another warehouse, where they were destroyed by fire.

It appeared that the plaintiffs were manufacturers of nails in the country, and that they had been in the habit of transmitting quantities of nails to the defendants, who were wharfingers in *London*, which the defendants from time to time sold for the plaintiffs, and charged them at the rate of 2*s.* a bag for keeping the nails in their warehouse, and also a commission upon the sale. In the course of the year 1810, the parties altered their mode of dealing; and it appeared from a letter written by the defendants to the plaintiffs, that they intended to charge at the rate of 10*l.* *per annum* as rent for the room in which the nails were deposited. Some time after this the defendants found it more convenient to place the nails in another warehouse, which was more accessible by land, and, after the removal, a fire broke out in the new warehouse, and the nails were destroyed.

It

It was contended, on the part of the plaintiffs, that since rent had been paid for the use of the particular warehouse in which the nails had been originally deposited, the defendants, on removing them, had taken upon themselves the burthen of answering for their security, and were responsible for the loss occasioned by the fire. Evidence was also adduced on the part of the plaintiffs, tending to shew that those very goods had been insured by the defendants, and that the amount of the nails had been received from the insurers.

1818.
 SIDAWAYS
 and Another
 v.
 TODD
 and Another.

On the part of the defendants, evidence was adduced to shew that the nails which had been insured were the property of the defendants; and it was contended that, as wharfingers, the defendants were not responsible for any loss by fire; it was also contended that since, in general, a wharfinger was not liable in such case, there was nothing to render the defendants liable here, since there had been no agreement for keeping the goods in any specific warehouse, and the defendants had a right to keep them where it was most convenient to themselves.

ABBOTT, J., was of opinion, that in point of law, a wharfinger was not responsible for goods which were casually burnt upon the premises, and said that it had been so decided in a case which he recollected to have been tried before Lord *Kenyon*. He was of opinion, that the plaintiffs were clearly entitled

1818:

SIDAWAYS
and Another

v.

TODD
and Another.

entitled to recover the sum received from the insurers, in respect of the nails, in case the jury should be of opinion that the defendants had in fact insured the property of the plaintiffs, and had received the value from the insurers. With respect to the question whether the defendants had incurred a special responsibility, (which did not attach to them as wharfingers,) by removing the nails from the particular warehouse in which the nails had been deposited, and in respect of which rent had been charged, he said that it might be subsequently considered, but that at present, he should permit the plaintiff to take a verdict.

The jury found for the whole of the demand, subject to be reduced to the amount received from the insurer, in case the Court should be of opinion that it ought to be so reduced.

In the course of the cause it was objected, that the plaintiffs were precluded by their bill of particulars from recovering under the count for money had and received. The bill of particulars was in this form.

“ The plaintiffs seek to recover the sum of 548*l*. of which they claim the sum of 36*l*. for nails sold by them to the defendants, and the sum of 512*l*. for 97 bags of nails, delivered by them to the defendants and not accounted for, which several sums of money they seek to recover, under all or any of the counts of the declaration which may be applicable.”

ABBOTT,

ABBOTT, J., was of opinion, that since the plaintiffs referred to the counts of the declaration, and intimated their intention to call in aid such of them as might be necessary, they were entitled to avail themselves of the count for money had and received, to recover such monies as had been received in respect of the subject matter specified in the bill of particulars.

1818.
SIDAWAYS
and Another
v.
TODD
and Another.

Scarlett and V. Lawes, for the plaintiffs.

Marryatt and Campbell, for the defendants.

Administratrix of PENRY v. BROWN.

Tuesday,
June 30.

THIS was an action on a covenant in a lease of a house, by which the defendant covenanted to repair and keep in repair, the premises and all erections, buildings, and improvements which might be erected thereon during the term, and yield up the same in good and sufficient repair, &c.

A tenant of a house, covenanting to keep in repair the premises and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, cannot remove a veranda erected during the term, the lower part of which is affixed to the ground by means of posts.

It appeared that during the term, the defendant had erected a veranda, the lower part of which was attached to posts which were fixed in the ground.

ABBOTT, J., was of opinion, that this veranda fell within the terms of the covenant, and that the defendant could not remove any part of it.

Verdict for the plaintiff for the value of the veranda.

Campbell and Maule, for the plaintiff.

Marryatt and Lawes, for the defendant.

1818.

Wednesday,
July 1.

ROGERS v. POPKIN.

A. executes a warrant of attorney to B. to enter up judgment and take out execution, with a defeasance on payment of a certain sum of money. B., after payment of this money, enters up judgment and takes A. in execution. A. moves the Court to set aside the judgment and execution, and after a rule *nisi* has been obtained, the whole is referred to a barrister, who awards that nothing was due to B. when he entered up the judgment, and that the judgment and warrant of attorney shall be set aside.

A., in an action of trespass and false imprisonment against B., who pleads the general issue only, is entitled to recover.

THIS was an action against the defendant, an attorney, for an assault and false imprisonment.

It appeared that the plaintiff, who was a silversmith, in the spring of the year 1817, had had some dealings with the defendant, relating to some bills of exchange, and that the plaintiff had eventually executed a warrant of attorney to enable the defendant to enter up judgment for the sum of 300*l.*, with a defeasance conditioned for the payment of 150*l.* On the 28th of *February* 1818, the defendant having entered up judgment on the warrant of attorney, sued out a *capias ad satisfaciendum* against the plaintiff, indorsed to levy 164*l.* besides fees, poundage, &c.

The plaintiff was arrested on this writ, on the 13th of *March* 1818, and remained in custody till the 20th of that month, when he was liberated under a judge's order on depositing the money in the hands of the sheriff. In the course of the next term, a rule *nisi* was obtained by the plaintiff, calling upon the defendant to shew cause why the money thus deposited in the hands of the sheriff should not be paid over to the plaintiff, and why the judgment and warrant of attorney should not

be

be set aside on the ground, that the whole of the debt had been satisfied before the judgment was entered up and execution taken out. Upon shewing cause against this rule, it was agreed that the whole matter should be referred to a gentleman at the bar, who should have power to award whether any and what part of the rule should be made absolute, and that such part as he deemed it proper to make absolute, should accordingly be made absolute, upon a motion to that effect, requiring only counsel's signature. The referee afterwards made his award, stating that nothing remained due upon the warrant of attorney and defeasance, at the time when the judgment was entered and execution taken out and awarded, that the judgment and warrant of attorney should be set aside, and the plaintiff then resorted to this action, to recover a compensation for the imprisonment which he had causelessly suffered; these facts having been proved —

1818.
 ROBERT
 vs
 FORTIN.

Topping for the defendant objected, that the action in its present form could not be supported, it ought to have been an action on the case, and not of trespass; since at the time of the writ sued out, there was a subsisting judgment which had not even yet been set aside; but —

Abbott, J., was of opinion, that the objection was not tenable, the defendant having pleaded the general issue only. If he had pleaded the judgment, and the writ of *capias ad satisfaciendum*,

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ROGERS

v.

POPKIN.

ciendum, by way of justification, the plaintiff might have applied to the Court in order to have the judgment set aside.

Verdict for the plaintiff, damages 800*l*.

Gurney and *Comyn*, for the plaintiff.

Topping and *Espinasse*, for the defendant.

BULKELEY v. LORD.

The defendant agrees to guarantee the plaintiff against any loss in case his son shall become bankrupt, and alleges in his declaration that his son has become a bankrupt, he is bound to shew that a commission of bankrupt has been sued out.

THIS was an action of assumpsit upon the defendant's guarantee.

The son of the defendant was the owner of the ship *Trinidad*, and applied to the plaintiff, a broker, to effect an insurance on the vessel. This the plaintiff refused to do, until the defendant had given the following guarantee :

“ Gentlemen—As you hesitate to make an insurance on my son's, *W. John's*, interest, in the brig *San Cuetana*, from the *Azores* to *America*, and from thence to *Lisbon*, under an apprehension that he may become a bankrupt, and you may become the losers for the whole, or part of the premium, and being desirous, for the interest of my son's concerns, that the said ship should be insured, I hereby agree to guarantee you from any loss on the said premium, should such bankruptcy

(a) See *Wilson*.

take

take place, in which case I will immediately repay you, whatever you may have paid, to effect such insurance.

W. LORD."

1818.

BULKELEY

v.

LORD.

The son afterwards committed an act of bankruptcy, by lying in prison more than two months, and the plaintiff was ready to prove a debt owing by the defendant at that time, upon which a petition for a commission of bankrupt might have been founded; and that he was a trader; but no commission of bankrupt had been taken out against him.

The question was, whether under these circumstances, the son was a bankrupt within the terms of the guarantee, and also within the terms of the declaration, which alleged that he had become a bankrupt.

ABBOTT, C. J., was of opinion, that the son had not become a bankrupt, as alleged in the declaration, no commission having actually been sued out; and the plaintiff was accordingly nonsuited.

In the ensuing Term, *Topping* moved to set aside the nonsuit, on the ground that the son had actually become a bankrupt within the meaning of the statute 21 J. 1. c. 19. s. 2.; and that the effect of the guarantee did not depend upon the suing out a commission, since commissions were frequently sued out where the parties afterwards turned out to be perfectly solvent: but the evi-

1818.

BULKLEY

v.

LORD.

dent meaning of the guarantee, was to protect the plaintiff against the insolvency of the son.

But the Court were of opinion, that the nonsuit ought not to be disturbed. If the instrument had been capable of a larger construction than that which the declaration alleged, the larger construction ought to have been declared upon; but as the declaration was framed, there could be no evidence of the son's having become a bankrupt, without shewing that a commission had been sued out. It was possible that the son might be unfortunate enough to commit an act of bankruptcy, although he was perfectly solvent; but it could not be the meaning of the guarantee to make the father responsible in such case, no commission being sued out. The Court, however, were bound to decide upon the declaration; but wished it to be understood that they did not intimate that the guarantee would bear a larger construction than that which had been adopted in the declaration.

THOMAS v. COOKE.

A., by parol,
lets a house to
B., who under-
lets to C.


A., with B.'s

assent, accepts C. as his tenant, and receives rent from him; A. cannot afterwards recover against B., since the privity of estate is destroyed.

THIS was an action of assumpsit to recover the sum of 20*l.* for the use and occupation of a house.

Thomas

Thomas let the house in question to *Cooke*, and the latter underlet the premises to *Perks*. The rent being in arrear, *Thomas* distrained upon *Perks*, who gave a bill of exchange for the amount.

1818.

 THOMAS
 v.
 COOKE.

Thomas then said, that he would have nothing more to do with *Cooke*, and took the bill of exchange in discharge of the rent. After this the plaintiff again distrained upon *Perks*, and then brought an action against *Cooke* for the rent now claimed.

The question was, whether *Cooke* still remained liable as the tenant of *Thomas*.

On the part of the plaintiff, it was insisted, that in point of law, the tenancy of *Cooke* still subsisted, since the Statute of Frauds (*a*) provides that "no lease, or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments; shall be surrendered, unless by deed, or note in writing, or by act and operation of law." And the case of *Mollett v. Brayne*, (*b*) was cited.

ABBOTT, J., left it to the jury to say, whether the plaintiff, after the distress, had not accepted *Perks* as his tenant, with the assent of *Cooke*. The jury finding in the affirmative, the plaintiff was nonsuited, with leave to move the Court to

(*a*) 29 C. 2. c. 3. s. 7.

2 Campb. 103.

1818.

THOMAS

v.

COOKE.

set aside the nonsuit, and enter a verdict for the plaintiff.

In the ensuing term, *Topping* moved accordingly ; but the Court were of opinion, that the circumstances constituted a surrender by operation of law. If a lessee assign, and the lessor accept the assignee of the lessee as his tenant, that in point of law puts an end to the privity of estate between the lessor and the lessee, and the lessee cannot bring an action of debt, because the privity of estate is destroyed. A landlord cannot have two tenants at the same time ; and here the plaintiff had made his election to take *Perks* as his tenant. In the case of *Mollett v. Brayne*, there was nothing but a parol surrender, but here there was not only a declaration on the part of *Thomas*, that *Cooke* should no longer be his tenant ; but another person comes in and is accepted as tenant, and the jury found that this was assented to by *Cooke*. It is a rule of law, that the acceptance of a subsequent lease by parol, operates as a surrender of a former lease by deed. If, therefore, a new lease had been granted to *Cooke*, that would have been a surrender of the former lease : now, *Cooke* having put in another tenant, a demise is made by *Thomas*, which could not be without a surrender of the first lease ; and therefore, when *Cooke* assented to the substitution, and the jury found that he did assent, the effect was the same as if *Cooke* had actually surrendered

surrendered the former lease. The Court also referred to the case of *Phipps v. Sculthorpe*, 1 Ba. & A. Rep. 50. (a)

Rule refused.

1818.
 THOMAS
 v.
 COOKE.

LANCASTER SUMMER ASSIZES.

REES and Another v. WARWICK.

THIS was an action brought by the plaintiffs as the indorsees of a bill of exchange, against the defendant as the acceptor.

The bill in question was dated *May* the 3d, 1816, and was drawn by *Cecil* and Co. upon the defendant for the sum of 100*l.*, payable two months after date, to the order of *Johnson* and Co., for value received.

The only question was, whether the bill had been accepted by the defendant. On the 4th of *May* (the day after the drawing of the bill) a letter was sent by the drawers to the defendant, advising him that the bill had been drawn upon him, and requesting him to honour it. On the 6th of *May* the defendant wrote to the drawers, stating, "Your bill for 100*l.*, payable to *W. Johnson* and Co. shall have attention." Upon the receipt of the last

The drawee of a bill of exchange being advised of the drawing of the bill by the drawer, and requested to honour it, answers by letter that "the bill shall meet attention," this does not amount to an acceptance, although it appears that in other instances the drawee has used the same expression when bills have been drawn upon him.

(a) See *Stone v. Whiting*, *supra*, vol. ii. p. 235., and the cases there cited.

1818.

REES
and Another
v.
WARWICK.

letter, it was communicated to *Johnson* for his satisfaction, but it had then been indorsed to the plaintiff. In order to shew that, by the terms used in the letter, the defendant meant to accept it, other letters of his relating to bills drawn upon him, were given in evidence, in some of which he used the expressions, "they shall meet protection," and "shall have attention."

It was objected, 1st, that the letter did not amount to an acceptance, because it was written to the drawers of the bill, and not to the indorsees; and 2dly, (which was the principal objection,) that the terms of the letter did not amount to an acceptance.

BAYLEY, J., being of that opinion, left it to the jury to say whether the letter amounted to an acceptance; and they being of opinion that it did not, the plaintiff was nonsuited.

In the ensuing term *Richardson* moved in the Court of K. B. for a new trial, contending, on the authority of *Powell v. Monnier* (a), and of *Wynne v. Raikes* (b), that an existing bill of exchange might be accepted by a letter written to the drawer, although it had passed out of the hands of the drawer. And secondly, that in the present case there had been a sufficient acceptance, since no particular form of words is

(a) 1 Atk. 611.

(b) 5 East. 514.

necessary to constitute an acceptance, and there was enough to indicate an intention on the part of the defendant to accept the bill; but the Court were of opinion, that the terms of the letter did not amount to an acceptance, and the rule was refused. (a)

1818.

REES
and Another
v.
WARWICK.

ABBOTT, L. C. J. I have no desire to break in upon the authority of the two cases which have been cited, but if a letter is to be considered as amounting to an acceptance, the intention to accept ought to be expressed in clear unequivocal terms. They were of that nature in those two cases, but here the phrase which is relied upon as an acceptance, is, to say the least, ambiguous; it may mean nothing more than this, — I will look into the accounts between us, — I will attend to the request so far as to enquire and examine. If it could have been shewn that the words bore this peculiar meaning, which is sought to be affixed to them, in the mercantile world, it might have been sufficient, but this has not been done. The evidence, however, such as it was, was fit for the consideration of the jury; and they were asked

by the learned Judge who tried the cause, whether they amounted to an acceptance, and they were of opinion that they did not.

HOLROYD J. I am of the same opinion. The very circumstance of its having been so often lamented that a bill of exchange might be accepted by letter, and by any other means than by writing on the face of it, on account of the inconvenience, affords a strong reason why we should not admit this letter to be equivalent to an acceptance. The words "shall meet due attention," do not import that the bill shall either be paid or accepted, they import no more than that the request shall meet with that attention which the drawer had a right to expect, and it does not appear from the other evidence in the cause that they were meant to be used in the sense of an acceptance.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings after Michaelmas Term,
59 GEORGE III.

WESTMINSTER.

Thursday,
Dec. 3.

COSSHAM v. GOLDNEY and Another.

Upon a plea
in abatement,
that the pro-
mises were
made jointly
with A. B.
and others,
A. B. is a com-
petent witness
for the plain-
tiff.

THIS was an action brought by the plaintiff to recover the sum of 400*l.* for work and labour done by him as an accomptant for the two defendants, *Goldney* and *Drummond*. The defendants had pleaded in abatement, that the promises had been made by them jointly with six other persons, specified in the plea, including one of the name of *Barrow*, and issue had been joined upon this plea.

It

It appeared that, for the purpose of investigating the affairs of the *Bristol Dock Company*, a committee, consisting of nine persons, had been appointed, one of whom was Mr. *Barrow*, and another of whom was then dead, and that the plaintiff had been appointed an accomptant for the purpose of investigating the affairs, at a salary of 10*l.* per month, by an instrument signed by the two defendants. The principal question was, whether Mr. *Barrow* had ever accepted the office of member of this committee; and the counsel for the plaintiff, in order to disprove this, and thereby to negative the plea, called *Barrow* as a witness.

1818.
 COSHAM
 v.
 GOLDNEY
 and Another.

Scarlett, on the part of the defendant, objected that he was incompetent, being interested to procure a verdict for the plaintiff against the present defendants, which would exonerate himself; but—

BAYLEY, J., held that he was a competent witness, since, if the plaintiff succeeded, he would still be liable to make contribution to the present defendants, in case he was really a partner, and the present record would not be evidence in an action brought by them against him, to shew that they alone were liable. And the evidence was accordingly admitted.

The case was afterwards left to the jury, upon the question, whether *Barrow* had ever assented to his election

1818.

COSSHAM

GOLDNEY
and Another.

election and accepted the office. The jury found for the plaintiff. Damages 400*l*.

Gurney and Tindal for the plaintiff.
Scarlett and Gaselee for the defendant.

Friday,
December 4.

DELAUNEY v. STRICKLAND.

Where goods are ordered by one member of a club for the benefit of all, every member, who either concurs in the order or subsequently assents to it, is liable, although the member who ordered the goods is made the debtor in the plaintiff's books and the bill is sent to him, unless it clearly appear that the plaintiff meant to give credit to that member only.

THIS was an action of assumpsit for goods sold and delivered.

It appeared that the defendant was one of the members of a club, called the "General Service Club," the business of which had been managed by the defendant and two other gentlemen, *Hall* and *Ryall*. Mr. *Hall*, it appeared, had ordered at different times, plate from the defendant, for the use of the society; and the defendant having some acquaintance with him, had credited him with the amount in his books, and had made out a bill to him as debtor. Part of the plate had been sent to a house in *Arundel-street*, where the club was held, and other part to a house in *St. James-street*, to which the club had been removed. It had been used by the members of the club, and by the defendant amongst the rest.

On the part of the defendant, it was contended, that the credit had been given to Captain *Hall* in the first instance, and not to the members of the society

society at large, who were a fluctuating body; and that after this the plaintiff could not shift the credit, and call upon the present defendant for payment.

1818.

DELAUNEY

v.
STICK-
LAND.

ABBOTT, L. C. J., left it to the jury to say, whether the goods had been ordered with the previous concurrence or subsequent approbation of the defendant; for if that was the case, he, and all who stood in the same situation, were liable to pay for the goods; and whether the fact, that Captain *Hall* had been entered as the debtor in the plaintiff's books, and that the bill had been made out in his name, were sufficient to convince them that credit was given to him alone.

The jury found for the plaintiff, damages 10*l.* 14*s.*

WOOD v. ROBERTS.

December 4.

THIS was an action by the plaintiff, who was a brewer, against the defendant, a publican, to recover a balance upon an account stated.

The plaintiff having made out a *prima facie* case, it appeared on the part of the defendant, that the plaintiff having taken possession of the defendant's property, some of which he sold; ar-

If one creditor, by undertaking to discharge his debtor, induce another creditor to discharge that debtor, on receiving a composition for his debt, he

cannot afterwards recover from that debtor.

rangements

1818.

WOOD

v.

ROBERTS.

rangements had been made with different creditors to receive a composition for their respective debts. *Deady* and *Henly* being creditors of the defendant's, to the amount of 60*l.*, agreed to take 30*l.* in discharge of their debt, upon the express condition, on the part of the plaintiff, that he, taking the residue of the property, would also discharge the defendant. It also appeared that *Deady* and Co. had received 20*l.*, part of that sum, from the plaintiff; and that another creditor had agreed to take 10*s.* in the pound, but without any communication with the plaintiff; and that a warrant of attorney which had been given by the defendant to the plaintiff, as a security for his debt, had been delivered up to the defendant.

Marryatt, for the plaintiff, contended, that this was no answer to the action, since there was no general composition with the creditors, nor any communication between the plaintiff and any creditor, except once; but —

ABBOTT, L. C. J., in summing up to the jury, stated his opinion, that if the plaintiff had, by his undertaking to discharge the defendant, induced any other creditor to accept a composition, and discharge the defendant from further liability, he could not afterwards enforce his claim, since it would be a fraud upon that creditor. By giving up the warrant of attorney, which the plaintiff held as a security, he either actually discharged the defendant, or he gave it up with a view to induce

duce other creditors to discharge him, which was a fraud upon the other creditors; and if so, in point of law, the plaintiff would not be entitled to recover.

1818.
 WOOD
 v.
 ROBERTS.

The jury found for the defendant.

Marryatt and Chitty, for the plaintiff.

Gurney and Reader, for the defendant.

KEATING v. BULKELY.

THIS was an action against the defendant, for the use and occupation of the plaintiff's house.

The plaintiff in *April* 1817, had agreed with *Dudding*, the proprietor of a house in *Cleveland-row*, for the purchase of the lease for the sum of £2000l., subject to a ground rent of 140l. payable to the crown, part of the consideration was paid by the plaintiff, and he gave bills for the rest, which became due the *December* following. In *April* 1817, Mrs. *Musters* the plaintiff's mistress, took possession of the house by his permission, and had resided there ever since. Immediately after this, the plaintiff went to *France*, and returned in *October*, when he found that Mrs. *Musters* was then living in the house with the defendant, to

A. having an equitable title to a house, under an agreement for the lease of it, permits his mistress to occupy it, it is afterwards agreed between them that she shall take up the bills which he has accepted, in part payment of the purchase-money, and that the lease shall be assigned to her ;

she remains in possession and does not take up the bills, and marries the defendant, who occupies the house, A. cannot recover against the defendant for use and occupation.

whom

1818.

KEATING

BULKLEY

whom she was married about *Christmas* following.) An interview then took place, between the plaintiff and Mrs. *Musters*, when she agreed to take up the bills which had been given by the plaintiff, for the remainder of the purchase money for the house, and he gave directions that *Dudding* should convey the house to her.

Mrs. *Musters* had not taken up the bills according to her promise, and the defendant had remained in possession of the house since *Christmas* 1817, when he married Mrs. *Musters*. The plaintiff attempted to prove notice to the defendant to pay rent to the plaintiff, but failed in doing so.

It was objected, that since the plaintiff who had a mere equitable title to the premises, and had shewn no contract either express or implied on the part of the defendant to pay rent, could not recover.

On the part of the plaintiff it was contended, that although he had a mere equitable title, yet since the defendant had had a beneficial occupation of the house, he was liable in law to pay for it. In support of this position, the case of *Hearn v. Tomlin* (a), was referred to, and also the case of *Kirkland v. Pounsett* (b), and also the case of *Hall v. Vaughan*, which was tried before Mr. J. *Holroyd*, at the last assizes for *Herefordshire*, and which had since been discussed before the Court of Exchequer.

(a) *Peakes*, N. P. C. 192.(b) 2 *Taunt.* 145.

ABBOTT, L. C. J., was of opinion, that the plaintiff was not entitled to recover. There had been no demand made upon the defendant for the payment of rent; and no evidence of any acknowledgment by him of the plaintiff's title to the house, and for any thing that appeared, he might have conceived himself to be legally entitled to the house. It did not appear that there was any contract express or implied to pay rent for the house, and under the circumstances it was impossible to say, whether the contract was to pay rent or to pay for the house. If a communication had been made to the defendant, that the plaintiff insisted upon the payment of rent, and he had afterwards remained in the house, it might possibly have been inferred, that he intended to pay the rent. As the case stood, however, there was nothing from which any contract could be inferred, to pay rent for a year, month, week, or any other period.

1818.

KEATING
v.
BULKELY.

Plaintiff nonsuited.

Scarlett and Tancred for the plaintiff.

Marryatt for the defendant.

1818. . .

Saturday,
December 5.

STEVENS v. ADAMSON.

A landlord having given notice to his lessee (under a covenant in the lease) that he would re-enter if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of sale.

THIS was an action of assumpsit, brought against the defendant, an auctioneer, to recover the amount of a deposit paid on the purchase of certain leasehold premises, which the defendant had sold by auction, and of which the plaintiff had become the purchaser.

The premises, which consisted partly of a public-house, and other buildings, were at the time of the sale in a very dilapidated state, and by the terms of the original lease, the lessor was entitled to re-enter, in case the premises were not put into repair within the space of three months next after notice given to the lessee to that effect. Notice to repair had been served upon the lessee, (the vendor,) on the day before the sale, but this circumstance had not been communicated to the present plaintiff, and he had afterwards been ejected from the premises, in consequence of the breach of covenant.

On the part of the defendant, it was answered, that the defendant himself was not aware of the notice when the premises were put up to sale ; and that the plaintiff himself was well aware at the time of the ruinous state of the premises.

ABBOTT, L. C. J., was of opinion, that a person putting up premises for sale was bound to know

know how the premises were circumstanced; and whether notice of re-entry had been given by the landlord, in case the premises should not be put into repair. In such transactions good faith was most essential, and the vendor, or his agent, was bound to communicate to the vendee the fact of such notice.

1818.

STEVENS
v.
ADAMSON.

Verdict for the plaintiff.

Barrow, for the plaintiff.

Marryatt, for the defendant.

REX v. SOUTER.

Friday,
December 11.

THIS was the case of an indictment against the defendant for perjury, alleged to have been committed on the trial of the prosecutor, on an information against him in the Exchequer, for a smuggling transaction.

The Court of Nisi Prius will not notice objections to an indictment upon the trial, which fully appear on the record.

In the course of the trial, it was objected, on behalf of the defendant, that the indictment was imperfect, since it was drawn in the compendious manner, prescribed by the statute 23 G. 2. c. 11; and yet no count alleged that the question upon the answers to which perjury were alleged was material.

ABBOTT, L. C. J., said, that inasmuch as the objection appeared on record, he did not feel himself warranted in taking notice of it at *Nisi Prius*.

1818.

REX

v.

SOUTER,

The trial proceeded, and the defendant was convicted. (a)

Gurney, Denman, and Holt, for the prosecution.

The *Attorney-General, Raine, and Walton*, for the defendant.

IN THE KING'S BENCH.

Sittings after Michaelmas Term.

GUILDHALL.

Monday,
December 14.

SNELGROVE v. HUNT.

The non-joinder of a joint assignee of a bankrupt, in an action of assumpsit brought by the assignees, is a ground of non-suit upon the trial, under a plea of the general issue.

THIS was an action of assumpsit by two assignees of a bankrupt.

Upon the evidence it appeared that there was a third assignee living.

It was objected that he ought to have been joined.

For the plaintiff, it was contended, that the objection ought to have been taken by way of plea

(a) It appeared from the nature of the information itself, as suggested on the record, that the question was material; and the Lord Chief Justice seemed to be of opinion that it was sufficient that the

materiality of the question appeared upon the record, without any express allegation to that effect. See the Entries in Tremaine, 139, &c. Co. Ent. 166. 367. *R. v. Crossley*, 7 T. R. 315.

in abatement, and that it could not be taken upon the plea of the general issue; and that whenever plaintiffs sued in a representative character, whether as executors or assignees, the practice was to plead the non-joinder in abatement. It was contended, that at all events, if no authority on the other side was produced to shew that the non-joinder was a ground of nonsuit, the plaintiff ought not to be nonsuited.

1818.

SNELGROVE

v.

HUNT.

ABBOTT, L. C. J., enquired whether there was any authority to shew that the objection, as to mis-joinder, could not be taken upon the trial, observing that he did not recollect any case where such a non-joinder had been pleaded in abatement.

Plaintiff nonsuited.

WINDLE v. ANDREWS.

Tuesday,
Dec. 15.

THIS was an action by the plaintiff as the indorsee, against the defendant, as the drawer of an inland bill of exchange.

The plaintiff's case was proved, but, it appeared that the bill had been noted for non-acceptance but not protested. It was objected that a protest was necessary in order to enable the plaintiff to recover interest for the bill.

Semble the drawer of an inland bill of exchange, is liable to pay interest on the bill which has been noted for non-acceptance, but not protested.

1818.

WINDLE

v.

ANDREWS.

On the part of the plaintiff, it was contended, that a protest was unnecessary, except in the lieu of a foreign bill.

ABBOTT, L. C. J., assented to this, and the plaintiff recovered interest as well as principal.

December 15.

SIMMONS and Others v. KEATING.

A guarantee for the payment of goods, supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee.

THIS was an action of assumpsit on the defendant's guarantee.

The guarantee was contained in a letter written by the defendant to the plaintiffs, in which he engaged, that in consideration they would supply his niece *Mary Crowling* with such goods as she from time to time should wish to buy, he would guarantee to them the payment of any sum due to them on her account, not exceeding 50*l.*, credit to be given for six months, to commence from the next *January*.

It appeared that *Mary Crowling* had applied to the plaintiffs on the 6th of *December*, to supply her with goods which were selected by her, but which they refused to supply her with, unless she could procure a respectable reference, which should satisfy them as to her responsibility. After this, (on the seventh) she obtained the guarantee in question, and then the goods, which had been previously

viously agreed upon, were sent to her. It appeared also that a bill of parcels had been sent with these goods, entitled in this way: To Messrs Simmons and Co., at three and three months' credit.

1818.

Simmons
and Others

v.
KEATING.

Scarlett, for the defendant, objected, that the plaintiffs were not entitled to recover in respect of this parcel of goods, inasmuch as the contract with respect to them had been entered into before the guarantee was given, the goods having been ordered on the 6th, and the guarantee having been given on the 7th. The terms, too, were also different: by the terms of the guarantee, six months' credit were to be given, but according to the contract between the plaintiffs and *Miss Crowling*, as evidenced by the bill of parcels, the contract was to be paid in three months, by a bill at three months. Upon this contract, an action might have been brought by the plaintiffs, against *Miss Crowling*, at the end of three months, for not paying for the goods by a bill of exchange; but no action could have been brought on the guarantee, before the expiration of six months' credit; but —

ABBOTT, L. C. J., was of opinion, that since the sale of the goods was not complete till the delivery, and the delivery was posterior to the guarantee, and made upon the faith of it, the value of the goods was recoverable, under the guarantee: the credit under both guarantee and bill of parcels was six months.

F F 4

Verdict

1818.

SIMMONS
and Othersv.
KEATING.

Verdict for the plaintiff, for the whole amount of the goods.

Bolland and Manning, for the plaintiffs.
Scarlett, for the defendant.

PALMER and Others v. GOOCH.

In an action against the owner of a ship, for money supplied to the captain at a foreign port, it is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of part of that sum to such uses, and that the residue was placed to the private account of the captain. It is essential to prove the advance of a specific sum, that it was necessary for the use of the

THIS was an action of assumpsit, against the defendant, for money paid, laid out, and expended for his use.

The defendant was the owner of the *Astel*, East Indiaman, and the action was brought to recover the sum of 950*l.*, which had been advanced by the plaintiffs at *Calcutta* to *Hardiman* the captain, for the purposes of the ship. It appeared that at first 1700*l.* had been borrowed by the captain from the plaintiffs, on his owner's account, as for money to be applied to the use of the ship; and that on the 22d of *December* 1814, bills had been drawn upon *Gooch* the owner, to that amount; and that afterwards when it was found that 950*l.* only were wanting for the repairs of the ship, a letter had been sent to *England*, to countermand the payment of all but the 950*l.*, and the difference had been placed by the plaintiffs to the private account of *Hardiman* the captain. It also appeared that the plaintiffs had advanced very large sums of

money

money to *Hardiman*, and *Vickers* the purser of the ship, to be employed by them in a commercial speculation, and that 20,000*l.* was still due from them to the plaintiffs. The whole of the disbursements and expences attending the repairs of the ship amounted to 2894*l.* The captain had received from the *East India* Company, on the account of his owner after his arrival in *India*, 2159*l.* 7*s.* 3*d.* He had also received from passengers 6000*l.* in *India*, of which from 3 to 400*l.* had been received by him on the account of the owner; but it was stated by *Vickers* the purser, in evidence, that it was not usual to account for receipts for passage money till afterwards. It also was stated by *Vickers*, that the money had been borrowed for the use of the ship, and that 953*l.* 8*s.* of the money had been applied in necessary repairs.

1818.

PALMER
and Othersv.
GOOCH.

It was objected, that in a case like this, it was necessary to shew the advance of a precise sum, which was absolutely necessary for the exigencies of the vessel, but that here, on the contrary, the advance was upon a general account, between the plaintiffs and *Hardiman*, and that considering the amount of the disbursements compared with the receipts, it appeared that the advance was unnecessary. On the other hand, it was contended, that although a larger sum had been borrowed, than eventually turned out to be necessary for the purposes of the ship, yet that the sum now claimed was necessary, and had been specifically appropriated to that purpose.

ABBOTT,

1818.

PALMER
and Othersv.
GOOCH.

ABBOTT, L. C. J., it is clear that the captain had a general account with the plaintiffs, and he charges a portion of it to the use of the ship. This is not sufficient, there must be a distinct advance of a specified sum, on account of the ship, which must be specifically applied to the use of the ship. The advance of so large a sum as 1700*l.* is quite sufficient in this case to shew that it was not made for the specific purpose of necessary repairs, and if it was made upon a general account, the plaintiffs cannot recover. It is essential that the plaintiffs should prove an advance of a specific sum, for a specific purpose, instead of which they prove an advance of a much larger sum than was wanted for the repairs, a circumstance which is conclusive to shew that it was made without necessity. It is incumbent on the plaintiff to shew that it was necessary to borrow the money, and to prove the actual application of it ; it was so held after much consideration in the case of *Sir Humphrey Jervis*.^(a) Were it otherwise, it would be in the power of a captain to ruin his employers.

Plaintiffs nonsuited.

Gurney and Erskine, for the plaintiffs.

Scarlett and Marryat, for the defendant.

(a) See this case at length in and see the case of *Rocher*, v. Abbot's L. S. 3d. ed. P. 2. c. 3. s. 6 ; *Busher*, above reported, Vol. I. p. 27.

1818.

WHITWORTH v. CROCKETT and Another.

Wednesday,
Dec. 16.

THIS was an action of special assumpsit.

After breach of a contract for the sale and delivery of goods, the defendant enters into a fresh agreement in writing, to cancel the former agreement; and for the future sale of goods upon different terms, the second agreement relates to the sale of goods, and does not require an agreement stamp.

It appeared that the defendants by a special agreement, dated *January* 1817, had undertaken to deliver to the plaintiff 362 tons of forge pig iron, at a specified price per ton, and that 100 tons had been delivered according to this agreement, but that the defendants making default as to the residue, a second agreement had been entered into on the 31st of *July* 1817, by which the defendants, in satisfaction of the breach of their first agreement, agreed to deliver 220 tons of iron, at the price of 4*l.* 10*s.* *per* ton, and to deliver it at the rate of 10 tons *per* month, and if not, to pay and forfeit the sum of 100*l.* This agreement having been also broken, a third agreement had been entered into, by which the defendants in consideration of the former agreements, and of further time to be given them, for the delivery of the iron, contracted for the delivery of 10 tons more in the month of *October* 1817, of 10 more in *November*, and of 29 more on the 29th of *January* 1818, at the rate of 4*l.* 10*s.* *per* ton, and by which it was stipulated, that on breach of the agreement, the defendants should forfeit and pay the sum of 50*l.* to the plaintiff. This agreement was also broken. The declaration was founded on the 2d and 3d agreements, but the plaintiff relied on the

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WHIT-
WORTH

v.

CROCKETT
and Another.

the 2d count, which was founded upon the 2d agreement, to which it was contended he had a right to revert, the third agreement which had been substituted for it not having been performed.

It was objected on the part of the defendant, that the 2d agreement, which was in writing, could not be read in evidence, for want of an agreement stamp, which it was contended was necessary, since it related not only to the sale of iron to be subsequently delivered, but also to the cancelling of a former agreement, upon particular terms ; but—

ABBOTT, L. C. J., was of opinion, that the agreement related to the sale of goods, and that therefore no stamp was necessary. And the agreement was accordingly read.

It was afterwards contended, that the plaintiff was entitled to recover, not merely for the non-delivery of the iron according to the terms of the contract, but also the amount of the forfeitures ; but His Lordship was of opinion, that the forfeitures were in the nature of penalties, and not of liquidated damages, and that the plaintiff could not insist both upon the forfeitures and the contract, and that the only question was as to the value of iron, of the particular quality contracted for

for at the respective times appointed for the delivery.

Verdict for the plaintiff, damages 178*l*.

Scarlett, for the plaintiff.

Gurney and Reader, for the defendants.

1818.

WHIT-
WORTH

v.

CROCKETT
and Another.

BUTLER and Another, Assignees of OAKLEY and
Another, v. CARVER and Another.

Wednesday,
December 16.

THIS was an action of assumpsit, brought by the plaintiffs as the assignees of Oakley and Co., under a commission of bankrupt against the defendants, upon a special agreement by the latter, to deliver up a large quantity of woollen goods which had been delivered by the bankrupts to the defendants, who were *Blackwell Hall* factors, for sale on the account of the bankrupts, in consideration of the bankrupts having given up to the defendants a bill of exchange for the sum of 700*l*., accepted by the defendants in favour of the bankrupts on account of the goods. The declaration also contained other counts upon the same contract, alleging it to have been made between the assignees and the defendants.

A witness on examination on the *voir dire*, acknowledges that he has entered into a contract, (the effect of which is to render him incompetent,) at the same time he produces the written contract itself, this ought to be read.—A bankrupt after an act of bankruptcy, contracts with a

factor to whom he has delivered goods for sale, and who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, and does return the bill, the assignees may adopt this contract and recover against the factor, for the nondelivery of the goods.

A witness

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BUTLER
and Another
v.
CARVER
and Another.

A witness having been called by the plaintiffs to prove this contract, he was objected to as being a creditor upon the bankrupts' estate, to the amount of 30*l*. This sum was then paid him in court by a cheque by Mr. *Oakley* the brother of one of the bankrupts, and he took this in payment of the debt; and admitted that it was satisfied. He afterwards admitted, on further examination upon the *voir dire*, that he had taken the bill of exchange from the bankrupts to the defendants, and that he had entered into an engagement with the former, to bring back either the money or the goods. Being asked, on the part of the plaintiffs, whether the agreement was not in writing, the witness produced it, and said there was no other agreement on the subject. It was then contended, on the part of the plaintiff, that the agreement itself must be read as the proper evidence to shew the nature of the witnesses engagement.

Gurney, for the defendants, contended that it was competent to him to examine the witness as to his competency on the *voir dire*, although the agreement was in writing without producing the instrument.

ABBOTT, L. C. J., was of opinion, that as the witness had produced the instrument upon which the objection to his competency rested, it ought to be read, and it was read accordingly.

It

It appeared that the defendants had agreed to return the goods upon their acceptance being returned to them by *Oakley* and Co., and that the bill had been returned to them, and that they had broken their agreement by refusing to return the goods. It also appeared that the agreement to return the goods had taken place after the bankruptcy of *Oakley* and his partner, and two days before the commission was sued out. On the objection being made, —

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BUTLER
and Another
v.
CARVER
and Another.

ABBOTT, L. C. J., was of opinion, that the assignees were at liberty to adopt the contract which had been made by the bankrupts, and that the present action might be maintained by the assignees.

Verdict for the plaintiffs.

Scarlett, for the plaintiffs.

Gurney and *Campbell*, for the defendants.

NELSON and Another v. ALDRIDGE.

Thursday,
December 17.

THIS was an action of special assumpsit, against the defendant as an auctioneer.

A declaration in assumpsit against an auctioneer, for having rescinded a con-

The plaintiffs had sent to the defendant 20 horses to be sold by auction, which were described in the contract of sale (which he had made), contrary to his duty as auctioneer, may be supported by implication of law arising upon the facts of the employment of the auctioneer by the plaintiff, and his sale of the goods, without proof of an express contract on his part, not to rescind the contract. In such case, it is incumbent on the defendant to establish a legal excuse for deviating from the usual practice, although the proof involve the proof of a negative.

adver-

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NELSON
and Another
v.
ALDRIDGE.

advertisement of sale, which was drawn up under the direction of the plaintiffs, as eleven fresh and active horses in good condition, which had lately been in constant employ on the *Essex* road. The declaration contained 16 counts: the plaintiffs relied on the 7th, which alleged that the defendant, being an auctioneer, for reasonable hire and reward, &c. undertook to perform his duty as such auctioneer in the sale, &c. of the plaintiffs' cattle, and if he sold any of them not to receive the cattle back, nor to rescind the contract.

It appeared that, by the condition of sale, every purchaser was bound, when any article was knocked down to him, to pay five shillings in the pound, in part payment, and that it was to be taken away within one day at the expence of the buyer.

One *Gullen* had become the purchaser of one of these horses at the sum of 57 guineas, but he paid no deposit, and afterwards took away the horse without paying for it; and upon his afterwards making complaint to the defendant, that the horse did not answer the description in the advertisement, the defendant took him back.

On the part of the defendant, it was contended, that the plaintiffs were not entitled to recover on the 7th count, upon which they relied, since no express contract had been proved; and that although the law implied a general engagement on the part of an auctioneer or other person to do his duty, it would not imply a contract to do or omit a particular thing, such as was alleged in this count; and the

the case of *Witherington v. Buckland*, Cas. T. *Hardwicke*, 309. was cited ; but —

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NELSON
and Another
v.
ALDRIDGE.

BEST, J., was of opinion, that there was evidence to support this count. It was the duty of the auctioneer to sell and not to rescind, to do, not to undo ; and the law would imply a contract on his part to discharge his duty.

It was afterwards proposed, on the part of the defendant, to go into evidence to shew that the horse in question, when put in harness, would not draw. —

BEST, J., intimated that it was incumbent on them to go further, and negative the representation of the plaintiffs, that the horse was clever, fresh, and active, &c., and had lately been employed to draw upon the *Essex* road.

Gurney, for the defendant, contended that it was incumbent on the plaintiffs to prove the affirmative of this proposition ; but —

BEST, J., was of opinion, that since the defendant had deviated from the usual course of his duty, in taking upon himself to rescind the contract, it was clearly incumbent upon him to shew that he was warranted in so doing.

1818.

NELSON
and Another
v.
ALDRIDGE.

Such proof not being given, the plaintiffs had a verdict for 75 guineas.

Marryatt and Reader, for the plaintiffs.
Gurney and Chitty, for the defendant.

Friday,
Dec. 18.

SCOTT v. SCOTT and Others.

The owner of a barge upon the Thames lends it to another, who navigates it with his own men, who are guilty of negligence, in consequence of which mischief is done (*semble*), the owner is not liable.

THIS was an action on the case against the defendants, for having so negligently navigated their barge on the river *Thames*, that it ran foul of and destroyed a skiff of the plaintiff.

One ground of defence was, that the barge was not, at the time of the accident, in the possession and under the management and guidance of the defendants, and it was proved that, several days before the accident, the defendants had lent their barge to *Thomas*, who was called as a witness, and that the barge, at the time of the accident, was in his possession, and navigated by his servants. Under these circumstances it was contended, that the defendants were no more responsible for the mischief which had ensued whilst the barge was under management and guidance of *Thomas*, than the owner of a wheelbarrow would be if he lent it to another, who broke a person's legs with it.

On the part of the plaintiff, a distinction was attempted to be made between the case of a ship or barge and other cases, since it was necessary that

that the vessel should bear the name of the owner, and it was a matter of public convenience and policy, that the apparent owner should be responsible for any mischief occasioned by negligence in the conduct of his vessel. The case of *Fletcher and Others v. Braddick and Others*, (a) was cited, where it was held, that where a ship was chartered to the commissioners of the navy as an armed ship, and an injury was done to another vessel by the misconduct of the persons on board the former, whilst a commander of the navy and king's pilot were on board, an action was still sustainable against the owners of the chartered ship, although she was under the actual dominion and guidance of a captain put on board by government.

1818.

SCOTT

v.

SCOTT.

BEST, J., in that case, the vessel was still in the employment of the original owners, was navigated by their men, and was earning money for them. If you lent your carriage to me, and an accident happened whilst it was under the management of my servants, could an action be maintained against you? Since, however, a distinction has been suggested, which is peculiar to the case of a ship, although it appears to me that the action cannot be maintained, yet, in order to save expence to the parties, it may be better to go into the other points of the case.

Evidence was then gone into, to shew that the plaintiff's skiff had been improperly moored, and

(a) 2 N. R. 182.

1818.

SCOTT

v.

SCOTT.

that the accident was attributable to that circumstance.

Scarlett and Comyn, for the plaintiff.
Gurney, for the defendants.

Friday,
 Dec. 18.

WHITFIELD v. BRANDWOOD.

A landlord,
 under a cove-
 nant in a lease
 to pay the
 land-tax, is
 bound to pay
 the land-tax in
 proportion to
 the quantum
 of rent only.

THIS was an action of trespass, for breaking and entering the plaintiff's house, and taking his goods, &c.

The plaintiff was a tenant under the defendant of the house in question, and the latter had distrained for rent. The plaintiff had previously tendered him the amount of the rent, deducting 1s. for property-tax, and for the land-tax at the rate of 3*l.* 6*s.* 8*d.* *per annum*. The action was brought in order to ascertain whether the plaintiff, under the construction of a lease from the defendant and two others, was entitled to deduct the whole of the land-tax payable in respect of the premises, or upon the amount of the reserved rent only.

The lease of the premises had been granted to the defendant for the term of 50 years, in consideration of a premium of 850*l.*, at the yearly rent of 5*l.* 7*s.* 6*d.* payable quarterly, and without any deduction or abatement for or by reason of any rates, taxes, or assessments, imposed or to be imposed by any act or acts of parliament, except the land-

land-tax and property-tax. The land-tax, upon which alone the question arose, amounted to 3*l.* 6*s.* 8*d.* *per annum.*

1818.
 WHITFIELD
 v.
 BRAND-
 WOOD.

Marryatt, for the defendant, contended that the plaintiff the lessee was entitled to deduct for no more than the quantum of rent paid. The land-tax amounted to more than 10*s.* in the pound upon the rent paid; and if the premises were to be subsequently improved, and the plaintiff's construction of the covenant was correct, in process of time, the land-tax would exceed the rent; and the lessors, instead of receiving rent, would have to pay money to the lessee.

And he cited the case of *Yaw v. Leman* (a), where the landlord covenanted to pay the land-tax, and to save the lessee harmless. The premises were taxed at 150*l.* *per annum*, but the defendant paid only 140*l.* *per annum* as rent; and the Court stayed proceedings in an action upon the covenant, on the defendant's paying land-tax at the rate of 150*l.* *per annum*. He also cited the case of *Hyde v. Hill*, (b), where under a covenant in a building lease by a tenant, to pay all the taxes except the land-tax, it was held that the landlord was bound to pay the old land-tax only, and not the additional land-tax occasioned by the improvement of the estate.

Scarlett, for the plaintiff, contended that the defendant in the present instance was liable on

(a) 1 Wils. 21. (b) 3 T. R. 377.

1818.

WHITFIELD

v.

BRAND-
WOOD.

the covenant to pay the land tax. The legislature, in imposing the property tax, directed that the tax should be paid by the landlord, but the land-tax act left the payment of it to be the subject of mutual convention between the parties; the land-tax was not a tax which in general increased, and the whole depended on the meaning of the parties.

ABBOTT, L. C. J. At present I am of opinion that the plaintiff is not entitled to deduct for more than the amount of his rent; but I shall give the plaintiff leave to move the point.

The plaintiff was nonsuited.

Scarlett and E. Lawes, for the plaintiff.

Maryatt, for the defendant.

Thursday,
Dec. 17.

FERGUSON and Others v. CLARKE.


Where the declaration contained 30 counts on 15 bills of exchange, the Court at Nisi Prius refused to compel the plaintiff to select 15 of the counts on which to take his verdict.

THIS was an action by the plaintiffs, as the indorsees, against the defendant, as the acceptor, of fifteen bills of exchange.

The declaration contained thirty counts upon the bills of exchange, viz. two counts upon each bill; one alleging a special presentment, and the other omitting the presentment.

The plaintiffs having proved their case, it was objected, on the part of the defendant, that the plaintiffs

plaintiffs were not entitled to take a general verdict but on fifteen of these counts only, since they had proved fifteen bills of exchange only; but—

1818.

FERGUSON
 and Others
 v.
CLARKE.

BEST, J. refused the application, observing, that it was not the practice of the Court of Common Pleas to compel the plaintiff to select a count for every bill of exchange; and that it would impose great difficulties on the plaintiff if he were compelled to do so.

Verdict for the plaintiffs generally.

Gurney and Walford, for the plaintiffs.

Pollock, for the defendant.

GROJAN v. WADE.

Friday,
 Dec. 18.

THIS was an action of assumpsit, to recover the amount of fees, &c. due to the plaintiff, as a proctor, for procuring the probate of a will.

A witness of the name of *Owen* was called on the part of the plaintiff, who stated that he was clerk to the plaintiff, and proved that the business had been done. He admitted that he had conducted the whole of this business, and that he had made out a bill to the defendant in his own name;

A proctor may recover for business done for the defendant by his clerk, although the defendant apprehended that the clerk was the principal, he acting as the principal, and never disclosing

the name of his employer, provided no prejudice arises to the defendant from the concealment. — An agreement between a proctor and his clerk, to pay the latter a salary amounting to half the annual average profits of the last three years, is not an evasion of the statute.

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and that his general practice was to make out the bills to clients in his own name.

On the part of the defendant, it was contended, that since the defendant had known no other person in the transaction but *Owen*, never having heard of the existence of the plaintiff till the present action was brought, and the bill having been made out in *Owen's* name, the plaintiff was not entitled to recover; but—

ABBOTT, L. C. J. was of opinion that the circumstance of the defendant's ignorance that *Owen* was the mere clerk, and *Grojan* the principal, would not preclude the latter from recovering, it having been established on the oath of *Owen*, that the plaintiff really was the principal for whom he had acted. If any prejudice had arisen to the defendant from the supposition that *Owen* was the principal, the case might have been different; but that did not appear, and the sum claimed was clearly due from the defendant, since the business had been done. The case was like that of a factor, who conceals the name of his principal in selling goods.

It afterwards appeared, that after the passing of the statute which prohibits a proctor from sharing the fees with a clerk, the plaintiff, and *Owen*, the clerk, agreed that the latter should be paid at a salary calculated upon the average of the profits of the last three years, and that he was to receive the half of the average profits so calculated.

Marryatt, for the defendant, objected that this was a mere evasion of the act, and consequently that the plaintiff was not entitled to recover; and he referred to a case which was tried before Lord *Ellenborough*, where a proctor, being unable to take another into partnership with him, because he was a Roman catholic, had agreed to let him have half the profits; and Lord *Ellenborough* held that the prohibition contained in this statute precluded him from recovering; but—

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ABBOTT, L. C. J. was of opinion that in this case there had been no evasion of the statute. The agreement was to pay a salary regulated by an average of the last three years; and that salary would be payable, although during the current year no profits whatsoever were made.

Verdict for the plaintiff.

Scarlett, and *E. Lawes*, for the plaintiff.

Marryatt, for the defendant.

STAIGHT v. GEE and GARVER.

Friday,
Dec. 18.

THIS was an action of trespass for assaulting and imprisoning the plaintiff. — Plea, not guilty.

A constable
who imprisons
a person on
suspicion of

felony without any reasonable grounds, of his own authority, without any warrant or charge from any other person, is within the statute 21 J. I. c. 12. which requires the venue to be laid in the proper county. — If a private person act in such case in aid of the constable, and upon his command, he also is within the statute; otherwise, if he be the prime mover and act as a principal in the transaction.

It

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It appeared in evidence, that the plaintiff, an ivory carver, was returning along with *Ansley*, a groom, to *London*, with a horse from *Honerton*; he stopped at *Hackney*, at a public house kept by the defendant *Gee*. The plaintiff went out to a butcher's to buy some chops, but could not procure change for a one pound Bank note, which he afterwards shewed to *Gee*. *Gee* said that the note was forged; the plaintiff wrote his name and address on the note, and also the name of the person from whom he had received it. *Gee* asked him if he had any more notes; the plaintiff replied that he had one more, which he produced. *Gee* pronounced that note also to have been forged, and said that he should detain both the notes, and put them upon a shelf.

A soldier, who was in the house, went out and informed *Merry*, a constable, of the transaction; and *Merry* returned with him. In the mean time, the plaintiff having in vain requested *Gee* to return the notes, consulted with *Ansley* what should be done, and went out to get a constable. *Merry* took the notes to the house of *Fish*, a bank inspector, who was of opinion that the notes were genuine. After this, *Merry* took the plaintiff and *Ansley*, who were conferring together not far from *Gee's* house, into custody, and took them back to *Gee's*, and then gave them in charge to *Gee*, the soldier, and to *Garver*, who was also a constable. *Merry* then conferred with *Gee*; the plaintiff and *Ansley* were searched, and their stockings

ings taken off; and they were afterwards taken to the public office, at *Worship Street*, in custody of *Merry* and *Garver*, *Gee* walking before them with a stick. At *Worship Street*, about nine o'clock, they were discharged.

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On the part of the defendant *Garver*, it was contended, that since he was acting as a constable, he was entitled to an acquittal, the venue having been laid in the wrong county. Both *Hackney* and *Worship Street* being in the county of *Middlesex*, and the venue being laid in *London*. The statute 21 J. 1. c. 12. s. 5. directs, that if any action, &c. shall be brought against any justice of peace, mayor or bailiff of city or town corporate, headborough, port-reeve, constable, &c. or any of them, or any other which in their aid or assistance or by their commandment shall do any thing touching or concerning his or their office or offices for or concerning any matter, cause or thing by them, or any of them, by virtue or reason of their or any of their office or offices, that the said action shall be laid within the county where the trespass or fact was done and committed, and not elsewhere.

Marryatt, for the plaintiff, contended that *Garver*, although a constable, was not entitled to the benefit of that statute, since he had acted without warrant, and had not been called in to act, but had acted voluntarily, and according to his own discretion, and after it was known

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known that the notes were genuine, and that there was no pretence for imprisoning the plaintiff.

ABBOTT, L. C. J., said, that at first he had been inclined to think, that unless the constable acted on reasonable grounds of suspicion, he was not entitled to the protection of the statute, but that on further consideration he was of a different opinion. The statute merely provided that the action should be brought within the proper county, and afforded no further protection to the constable ; and although he had not been called upon to act, still he might think it his duty to act in the capacity of constable.

By the words in the statute, *by virtue of his office*, was meant, that he was acting under colour of his office, intending to act in the character of constable ; for if he in reality acted in the course of his office, he would want no protection.

On the part of the defendant *Gee*, it was insisted at first that he had not interfered in any way to effect the imprisonment of the plaintiff ; and evidence was adduced to shew that the soldier had of his own accord fetched the constable *Merry*, without any directions on the part of *Gee* ; and that after the arrival of the constables, he had acted under their authority and by their command. It was also urged, that since *Gee* had merely acted in obedience to the requisition of the constables, he also was entitled to the benefit of the statute 21. J. 1. and, therefore, that, with respect to him

as.

as well as *Garver*, the venue had been misconceived, since the statute extended to all who acted in aid of any constable.

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ABBOTT, L. C. J. after informing the jury that the defendant *Garver* was entitled to their verdict of acquittal, under the statute of *James*, proceeded to state that the same statute also protected all who acted by the aid or command of such constable, or in his assistance, and left it as a question of fact for their consideration, whether *Gee* acted merely in aid of *Garver* or *Merry*; in which case he would be entitled to their verdict of acquittal; or whether, on the other hand, he acted not merely in aid of the constables, but as a prime mover, and as a principal with them; and that, in the latter case, he was answerable for what had been done, and the plaintiff, as against him, would be entitled to such fair and moderate damages as they might think he deserved.

The jury acquitted *Garver*, and found for the plaintiff against the defendant *Gee*, damages 50*l*.

Marryatt and *Williams*, for the plaintiff.

Scarlett and *Gaselee*, for the defendant *Gee*.

Gurney, for the defendant *Garver*.

1818.

Tuesday,
Dec. 22.

THOMAS v. CLARKE and TODD.

In an action for not supplying a cargo under a charter-party, according to the terms of which, different articles of freight are to be paid for at different rates by weight, and the freighter is at liberty to supply which articles he pleases, an average value of freight, calculated upon the various rates of freight in the proportion of different articles usually carried on such a voyage, is the proper measure of damages.

THIS was an action on a charter-party, whereby the plaintiff, the owner of the ship *Fame*, 128 tons burthen, chartered her to the defendants, on a voyage to *Rio Janeiro* and back to *Liverpool*. By the charter-party the defendants stipulated to furnish a full cargo of lading for the return voyage at *Rio Janeiro*, and one of the breaches in the declaration, the only one on which any question was made, was that the defendants had not procured a cargo at *Rio Janeiro*.

A great many articles were specified in the charter-party; such as coffee, cotton, sugars, &c., of which the cargo might consist; and the defendant contracted to pay for the freight of each of these articles separately by weight, for coffee at 12s. 6d. per cwt. &c.

The defendants had not supplied any lading at *Rio Janeiro*, and the ship returned without any; and one question in the cause was, how the damages were to be estimated? It was suggested on the part of the defendants, that the defendants were not liable for more than the amount of the freight, supposing the vessel to have been laden with one of the articles specified, which would have yielded the lowest amount of freight. Evidence was given of the amount of freight, calculated on the supposition that one-third of the cargo consisted

consisted of coffee, another third of cotton, and another third of sugar. Supposing the whole cargo to have consisted of coffee, or of cotton, the amount would have been higher than the average taken; but if it had consisted of sugar only, the amount would have been less than this average. Evidence was also given of what the vessel had actually earned on former and similar voyages, which exceeded the demand which the plaintiff made for dead freight, according to the estimate taken in the present instance.

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ABBOTT, L. C. J. intimated, that the proper course would be to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least; and that he should inform the jury that such an average was the proper measure of damages.

Marryatt, on the part of the defendant *Todd*, submitted that, by the terms of the charter-party, the defendant *Clarke* had contracted for himself only, and that the defendant *Todd* was not bound by the charter-party. In the commencement of the charter-party, the defendant *Clarke* proposed to contract for himself and his partner *Todd*, but throughout the remainder of the instrument the said *freighter* only was mentioned, and the obligation at the conclusion of the charter-party was in the name of the said *freighter*, without introducing the name of *Todd*; but —

If a partner who executes a charter-party by the terms of the instrument, in the commencement of it professes to contract for himself and his partner A., A. will be bound although all the stipulations and obligations in the remaining part of instrument are made in the name of the said *freighter*.

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ABBOTT, L. C. J., was of opinion that the words in the beginning of the instrument, for himself and his partner, ran through the whole of the instrument. If it had not been intended that *Todd*, the partner, should be bound, and that *Clarke* alone should have been responsible, there would have been no reason for introducing the name of *Todd*, the partner, at all.

In an action by the owner against the freighter of a chartered ship for not supplying a cargo according to the terms of the charter-party, the freighter cannot insist upon the precise burthen stated in the charter-party.

Marryatt afterwards contended, that a considerable deduction ought to be made from the calculated amount of the dead freight, on account of the misdescription of the burthen of the vessel in the charter-party. She was there described as of 128 tons burthen, without any intimation that this was the mere registry burthen; whereas it appeared in evidence, that she could carry 195 tons; and the calculation was made upon the supposition that she took 180 tons exclusive of 15 tons of fustick, which had been stipulated for in the charter-party; but —

ABBOTT, L. C. J., intimated his opinion, that unless the misrepresentation had been fraudulent the freighter was not entitled to insist upon the specific burthen mentioned in the charter-party. It was well known that the actual burthen of which a ship was capable generally exceeded that at which she was registered.—If the misdescription had been the other way, the defendants would have had the benefit of it.

The

The plaintiff had a verdict for a sum agreed upon.

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Scarlet and Littledale for the plaintiff.

Murryatt and Campbell for the defendants.

ELLIS and Another v. WATSON and Two Others. Tues day
Dec. 22.

THIS was an action of assumpsit by the plaintiffs, who were brewers, against *Watson, Elgie, and Worthington*, for beer sold and delivered to them. *Worthington* alone defended the action, and his defence was that he was not a partner.

An entry by A. at the custom-house, in the name of A., B., and C., of premises for the keeping of beer for sale, is conclusive where the Crown is concerned, against A. as to his partnership with B. and C., but with respect to private persons it is merely *prima facie* evidence.

It appeared that *Worthington* had served *Watson* and *Elgie* (who undoubtedly were partners and dealers in beer) as cellarman, at the wages of 3*l.* per week, but that he had left their service previous to the month of *April*, 1818, when the beer which was the subject of this action was delivered. In order to establish his partnership with *Elgie* and *Watson*, the plaintiffs relied upon an entry made at the Custom-house by *Worthington* himself on the 11th of *August*, 1817, the law requiring all persons who deal in exciseable commodities to make an entry at the custom-house, of the place in which they are kept. This entry purported to be an entry by *Watson, Elgie, and Worthington*, of certain premises for the purpose of keeping beer for home consumption and exportation :

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exportation : it was also proved, that on the 21st of *November*, 1818, *Worthington* had entered a *withdraw* of the former entry.

On the part of the defendant *Worthington*, evidence was adduced to shew that different persons who had dealt with *Watson* and *Elgie* always dealt with them alone, without any knowledge that they had any partner, and that whilst *Worthington* remained with them he always acted as a servant, and received wages, and that he had never in any way interfered as a partner.

ABBOT, L. C. J., was of opinion that as between *Worthington* and the plaintiffs, or any other private individuals, the entry at the Custom-house was not conclusive to prove a partnership, although it would have been otherwise in any proceeding by the Crown ; and he left it to the Jury, upon the whole of the evidence, to say whether *Worthington* was a partner or not.

Verdict for the defendants.

Scarlett and *Hutchinson* for the plaintiffs.
Campbell for the defendant *Worthington*.

SHAW v. ROBERTS and Others.

1818.

THIS was an action of ~~assumpsit~~ against the defendants, who were coach-owners, for goods sold and delivered.

The Court will reject evidence in itself illegal, notwithstanding the admissions or omissions of the litigants.

In the course of the trial the counsel for the defendant asked of a witness whether *Roberts*, one of the defendants, had not been examined on a former trial, in which the witness was the plaintiff; the witness answered that he had been so examined, and, in answer to another question, said that he, the witness, had been nonsuited. He was then asked by the plaintiff's counsel whether he had not been nonsuited on the evidence of *Roberts*, and he answered that he had.

Scarlett, for the defendant, then insisted that he was at liberty to inquire what *Roberts* had said upon the former trial, the counsel for the plaintiff having drawn from the witness the fact that the nonsuit was founded upon the evidence of *Roberts*.

ABBOTT, L. C. J., said, that he had taken down nothing concerning the nonsuit upon his notes, and that the evidence then inquired into was inadmissible in point of law, and consequently that he should not be justified in receiving it. The matter then pending was of a trivial nature, but the same question might occur in cases of the highest importance,

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portance, where the admission of such evidence in the present instance might be cited as a precedent.

Scarlett urged that the Court was bound to admit this evidence, the opposite counsel having rendered it admissible by putting questions to which, although in themselves objectionable, the defendant's counsel had not objected; and it was competent to parties to make admissions for the purposes of the cause.

ABBOTT, L. C. J., said, that he was clearly of opinion that the evidence was inadmissible. The Court had nothing to do either with the admissions of counsel, or with any omissions on their part to object to evidence which had been improperly offered. It was the business of the Court to guard against the reception of improper evidence, independently of any admissions whatsoever; and it was the duty of the Court to reject illegal evidence, although the parties on both sides should agree to admit it. The admission of particular facts for the purpose of trial was a matter of very different consideration; for such facts were admitted as proved by sufficient and legitimate means; but in the present case the evidence itself was illegal and improper. — The evidence was consequently rejected.

CASES

ARGUED AND DECIDED

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AT

NISI PRIUS

IN K. B.

At the Sitzings after Hilary Term,

59 GEORGE III.

SITTINGS AFTER TERM AT WESTMINSTER.

WARNE v. CHADWELL.

Feb 20.

THIS was an action on the case for words spoken of the plaintiff in his trade of a maker of instruments for drawing beer. The words were; "He is a bankrupt, and cannot pay 5s. in the pound, he is not fit to be trusted."

In an action for slander, words are given in evidence in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words.

For the purpose of showing a malicious intention on the part of the defendant, the plaintiff proved that the defendant on another occasion had said, that the plaintiff had called his creditors together, and had offered them a composition of 5s. in the pound.

On the part of the defendant proof was offered of the truth of the latter words, which the de-

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fendant had had no opportunity of justifying, since they were not upon the record, and

ABBOTT Ld. C.J. was of opinion that such evidence was admissible, and it was given accordingly.

The plaintiff afterwards had a verdict, damages 200*l*.

Gurney and Platt for the plaintiff.

Scarlett and Adolphus for the defendant.

See Buller's N.P. 10. Collison v. Loder.

REX v. LEVY and Others.

An indictment for a misdemeanor, containing several counts, alleging several misdemeanors of the same kind on the same day, the prosecutor may give evidence of such misdemeanors on different days.

THIS was an indictment against Levy and three others for a conspiracy. The indictment alleged that *Elizabeth Harris* being in a state of pregnancy, during her parturition, the defendants conspired together by making loud noises, and by knocking violently against the wall of the room in which the prosecutrix lay, to injure and terrify her. There were two counts for conspiracies, and one for a riot, &c.

It appeared that the prosecutrix, *Elizabeth Harris*, was a Jewess, and that she had lived with *James Tweedie*, a Christian, as his wife, under a promise

promise of marriage from him, but that they had never been married; and it was proved, that the defendants (who were Jews), and who it appeared had been offended at the prosecutrix's supposed marriage with a Christian, had, on the day specified in the indictment, *viz.* the 13th of *September*, whilst the prosecutrix was in labour, been guilty of the annoyance complained of in the indictment.

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Andrews, for the defendants, cited the *King v. Lloyd (a)*, where Lord *Ellenborough* had held that the making loud noises to the disturbance of individuals in the occupation of their chambers, was not an indictable offence.

ABBOTT Ld. C. J. said, that he could not, sitting there, decide upon the validity of the indictment, the defendants might have demurred, or might move in arrest of judgment.

Evidence being afterwards offered of similar conduct on the part of the defendants on a different day from the 13th of *September*,

Andrews objected, that since but one day was alleged on the record without the addition, "and on divers other days and times," it was not competent to the prosecutor's counsel to adduce evidence of any offence on another day, and he referred to a case decided by Lord *Ellenborough*.

(a) 4 Esp. 2co.

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ABBOTT Ld. C. J. said that the present case was distinguishable from that cited, since here there were two counts for conspiracies and one for a riot; and that evidence at all events might be given under the different counts of offence on separate days.

The Jury found *Levy* and two others guilty of a conspiracy.

Scarlett and *Chitty* for the prosecution.

Andrews and *Platt* for the defendants.

Where several different felonies are alleged in the same indictment, it is usual for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge, 3 *T. R.* 106. *Rex v. Jones*, 2 *Camp.* 132. *Rex v. Kingston*, 8 *East*, 41. But this rule has not been extended to misdemeanors, and it is the common practice to receive evidence of several libels, and of several assaults under the same indictment. See Lord *Ellenborough's* observations in *Rex v. Jones*, 2 *Camp.* 132. Where the indictment comprehends several distinct misdemeanors charged against different persons, it may be a good ground of application to the discretion of the Court to quash the indictment, on account of the inconvenience which might result at the trial from joining different counts against different offenders. Many of the
older

older precedents contain a great number of different charges against the same defendant. In *Broughton's case*, *Trem.* 111., the indictment charges no less than twenty distinct acts of extortion. See also *Rex v. Lee*, *Trem.* 248., and *Rex v. Baxter*, *Trem.* 55., where different libels are set out.

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ROSKELL v. WATERHOUSE and Another.

THIS was an action of assumpsit against the two defendants, as carriers, for negligence, in the carriage of two boxes containing watch plates, dials, &c.

In an action against a carrier for not taking care of and safely carrying goods according to his promise, it appears that he has limited his responsibility as a carrier, by means of a notice, of which the plaintiff was cognisant, the plaintiff having declared against the defendant as a carrier in the usual form, cannot insist

It was proved that the goods had been delivered at the defendant's coach-office in Lad-lane, directed to the plaintiff at Liverpool, and that the sum of 3s. 2d. had been paid for the carriage and for booking the goods. It appeared, however upon the cross-examination of one of the plaintiff's witnesses, that he had been in the habit of sending down parcels to the plaintiff by the same conveyance, and that two boxes which had been formerly sent at different times, had been lost, and that after these losses the plaintiff had brought no action to recover the amount from the defendant, but had

that the goods were lost from the defendant's warehouse before the actual carriage of the goods commenced.

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ther.

directed the witness for the future to insure the parcels which he sent.

ABBOTT Ld. C. J. intimated his opinion, that this would be evidence against the plaintiff to show that he knew that the defendants limited their responsibility unless a higher rate was paid for the carriage of the goods by way of insurance.

The person who took the goods to the office afterwards, admitted that he knew that the defendants had limited their responsibility according to the notice produced, and that he had seen the notice before he received the parcel.

Scarlett for the plaintiff, then submitted the question to the Court, whether the defendants could insist upon the notice as a defence in the present instance, since it did not appear that the goods had ever been put into the coach for the purpose of being conveyed, and therefore might have been stolen from the defendant's warehouse. The declaration alleged a delivery of the goods to the defendants to be by them *taken care of* and to be safely delivered to the plaintiff, and that the defendants undertook, &c. to take care of the goods and safely carry them, &c.; but the notice was in the usual form by the defendants as carriers; but —

ABBOTT Ld. C. J. was of opinion that at all events the plaintiff could not, as his declaration was framed, insist upon this ground, since he ought to have charged

charged the defendants as warehousemen and not as carriers; or to have charged them with receiving the goods to be taken to a particular coach in order to be carried; but here the plaintiff had merely charged them with negligence as carriers.

Plaintiff nonsuited.

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Scarlett and Carter for the plaintiff.

Gurney for the defendant.

STEEL v. PRICKETT and Others.

Feb. 22.

THIS was an action of trespass against the defendant *Prickett* and two others, for breaking and entering the close of the plaintiff holden by him of Dame *Jane Wilson*, lady of the manor of *Hampstead*, by copy of court roll.

The presumption is, that the waste land which adjoins to a road, belongs to the owner of the adjoining freehold, and not to the lord of the manor.

The question raised by the pleadings was whether the *locus in quo* belonged to the dean and chapter of the collegiate church of *St. Peter, Westminster*, as parcel of their manor of *Hamstead*, in the county of *Middlesex*.

General evidence of title to such wastes

The *locus in quo* was a small piece of land which adjoined to the high road leading from

Semble reputation alone is *admissible* evidence to prove the existence of

a manor without any proof of the actual exercise of any manorial right.

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Hampstead to *London*, which had been inclosed by the plaintiff, who was tenant to Lady *Smith*, who was lady of the manor of *Hampstead*, and it was contended on his part, that the *locus in quo* belonged to Lady *Smith* in right of her manor, as being part of the wastes of that manor. On the other hand, the defendant, who was tenant to the Dean and Chapter of *Westminster*, insisted,

1. That the *locus in quo* was the property of the Dean and Chapter of *Westminster*, because it adjoined to the freehold lands of the Dean and Chapter; whence presumption arose, that the waste and soil to the centre of the road also belonged to them; and

2. It was contended that the Dean and Chapter were seised in fee of the estate and manor of *Belsise*, and entitled to the *locus in quo* as parcel of that manor.

On the part of the plaintiff evidence was adduced to shew, that the lords of the manor of *Hampstead* had, from time immemorial, exercised the right of granting out parcels of the waste lands within the manor with the consent of the copyholders. Thirteen instances were adduced of grants of this nature, the first of which was made in the year 1694, and the two last in the year 1817. In some instances the portions of land so granted out, were situated between the road and the copyhold lands adjoining, in others between the road
and

and freehold lands. An entry in Domesday Book was proved from which it appeared that the manor of *Hampstead* then existed, but no mention was made of the manor of *Belsise*; also a grant by king *Henry VIII.* of the manor of *Hampstead*, &c. with a special reservation of *Belsise* and its appurtenances, in which it was described as a messuage and not as a manor, to *Thomas* bishop of *Westminster*. Another grant of the manor of *Hampstead*, 4 *Ed.* 6. by which king *Ed.* 6. granted the same manor with several others, to *Thomas Wrothe*, from whom Lady *Wilson* derived her title.

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The defendants relied principally upon the presumption, that the waste belonged to the Dean and Chapter of *Westminster* as owners of the adjoining freehold; but insisted also, that the *locus in quo* was parcel of the manor of *Belsise*, and offered, first, a copy of a document in the augmentation office, by which the king's receiver acknowledged the receipt of rent in respect of the farm of the manor of *Belsise*, in the thirty-second year of *Hen.* 8. Also a grant by *Hen.* 8. in the year 1542 (the abbey of *Westminster* being then dissolved) of the manors of *Eveny*, *Belsise*, *Knightsbridge*, *Hobforth*, and *Cowhouse*, situate and being in *Hendon* and *Hampstead*, to the Dean and Chapter of *Westminster*. Also a grant of the 4th of *Ph.* & *M.* of the same manors to the restored abbot and convent of *Westminster*, and also another grant by queen *Elizabeth* (1566) of the same manor
 to

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to the Dean and Chapter of *Westminster*, who had remained in possession ever since. Evidence having been offered by the defendant of reputation, that *Belsise* was a manor; and as to the extent of the manor,

Scarlett, for the plaintiff, objected to it on the ground that mere reputation was in itself inadmissible, to shew that *Belsise* was a manor independently of some exercise of manorial rights, as an old lease may be evidence coupled with evidence of payment of rents, but that unless some act were proved, such as perambulation, mere reputation was inadmissible, and it could not be assumed that *Belsise* was a manor for the purpose of letting in evidence of reputation.

ABBOTT Ld. C. J. intimated his opinion that reputation alone was *admissible* evidence to prove the existence of a manor, a great number of manors rested upon no other evidence than reputation; at all events, the evidence offered was admissible in this case, since it went to shew that the manor of *Hampstead* did not extend to the waste in question.

Evidence of reputation was then admitted, and the defendant also proved, that many inclosures of portions of the waste, adjoining the road had taken place within the last thirty years, which the lady of the manor of *Hampstead* had not disputed, except in one or two instances, where it appeared
that

that rails which had been erected had been broken down by her orders, but it appeared that these had been replaced, and that no actions had ever been brought for such encroachments. It also appeared, that the tenants of the manor of *Hampstead* had been prevented from getting gravel upon the *locus in quo*.

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Scarlett, for the plaintiff, insisted in his address to the jury, that no sufficient evidence had been adduced to prove that *Belsise* was a manor, it had not been mentioned as such in Domesday, and had been specially reserved out of the grant of H. 8. of the manor of *Hampstead* to the bishop of *Westminster*, and in the reservation had not been described as a manor, and although it had in subsequent grants been described as a manor, yet, so had several others which were not manors, and there was not the slightest vestige of the exercise of any manorial right whatsoever. At all events, the right to the waste lands must depend upon usage and custom ; where inclosures are ancient and roads are of modern date, it might be admitted, that a presumption arose that the road had been made over the land of the adjoining proprietor, but where the road, as in this case, was ancient, such a presumption was destroyed. The road from *London* to *Hampstead* must have been of very high antiquity, and probably formed out of the wastes of the manor of *Hampstead*. It appeared from Domesday Book, which, according to tradition, had been commenced in the time of

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of king *Alfred*, and completed under *William* the Conqueror, that the manor of *Hampstead* had been part of the possessions of the abbott of *Westminster*, he, as lord of the manor, might have granted out portions of it to others, but there was no mention in Domesday of any freehold lands within the manor of *Hampstead*, nor of the manor of *Belsise*, which afforded a strong presumption that the road existed and was part of the manor of *Hampstead*. The etymology of the word *Belsise*, which was probably derived from the French words signifying beautiful seat or residence, afforded strong proof that it originated since the Conquest, and rendered it probable that the manor was of later date than the road, and if the road did exist before the manor of *Belsise*, it must have been carried over the waste of the manor of *Hampstead*.

ABBOTT Ld. C. J. in the course of summing up to the jury observed.—The question is whether the small piece of land in dispute is the soil and freehold of the Dean and Chapter of *Westminster*. The adjoining land is beyond all doubt the property of the Dean and Chapter—In some of the more ancient books of law, a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but as far as my own experience goes, and I have heard the opinions of many learned judges upon the subject, it has uniformly been laid down, that land under such circumstances is presumed in the first instance to belong to the owner of the adjoining land

land and not to the lord of the manor, but a presumption prevails only so long as proof to the contrary is wanting, and the question is whether the plaintiff has in the present instance rebutted this presumption to your satisfaction. In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labour and expence was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence, that although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road, and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the

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the frequency of wastes left at the sides of roads: the object was to leave a sufficiency of land for passage by the side of a road, when it was out of repair, is the general presumption of law, but this presumption is capable of being rebutted, and here the plaintiff undertakes to rebut it; he says that Lady *Wilson* is lady of the manor of *Hampstead*, and that, she, as lady of the manor, is empowered by immemorial custom within the manor, to grant out waste lands with the consent of the copyholders of the manor. This cannot be done without a special immemorial custom to warrant it, since a copyhold tenure cannot have been created within time of memory.' His lordship then commented on the evidence supplied by the different grants of waste under the manor of *Hampstead*, observing that, out of the ten grants which had been proved, some of which were of pieces of land between the road and copyhold land, and others (three in number) of parcels of land between the road and freehold lands, the latter were the only ones which were material for consideration, since, as to the wastes between the road and the copyhold lands of the manor of *Hampstead*, no doubt could arise as to the right, and it was only in respect of the parcels between the road and the freehold lands that the presumption applied. His lordship then added — This is the evidence adduced by the plaintiff, in order to shew that the usual presumption ought not to prevail in this case. The defendant, in answer to this case asserts,

1. That

1. That the presumption is in his favour, which arises from the contiguity of the waste to the freehold estate, and

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2. That *Belsise* is a manor, and that the *locus in quo* is parcel of that manor.

After commenting on all the evidence which had been adduced on both sides ; his lordship observed strongly upon the evidence of thirteen inclosures having been made of parts of the waste adjoining to the *Belsise* estate, without any permission given by the lady of the manor. It was true, that in some instances interruptions by her had been proved, but the occupiers had afterwards replaced the fences, and no action had been brought ; if the lady of the manor had intended to resist what she considered to be encroachments on her rights, she should have brought an action. It had been contended, that the lady of the manor had a general title to all the wastes within the manor, but she had not in any one of these instances of inclosure asserted her general right, and it was for her to do so rather than for individuals, whose interest was so minute. The evidence to prove that *Belsise* was a manor was but slight : it had been called a manor in some of the grants which had been read, but so also had *Cowhouses* and *Hobforth*, although the two latter never had been manors. If *Belsise* had been a manor, at some time courts must have been held for that manor, but there was no evidence that any court had ever been held ; and therefore it was not improbable, that
the

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the term manor had not been applied to *Belsise* in those documents in its proper and legal sense. In the grant of *Hen. 8.* it had been specially reserved under the description of a messuage only, and not of a manor. If, however, the jury should be of opinion upon this evidence, that *Belsise* was a manor, they were to find for the defendant, but if they were of opinion that *Belsise* was not a manor, the material question for their consideration would be, whether the plaintiff had given such evidence, as in their minds rebutted the usual presumption of law, that the waste belonged to the owner of the adjoining freehold.

Verdict for the defendants.

Scarlett, Gurney, Taddy Serjt. and Comyn for the plaintiff.

Casberd, Taunton, and Marriott for the defendants.

Feb. 26.

REX v. BROOKE.

A witness having been called into the box and sworn in the course of a prosecution for a misdemeanor, produces a document, but is not examined. The defendant is entitled to cross-examine.

THIS was an indictment for perjury.

The attorney for the prosecution was called and sworn, and produced a copy of a declaration in an

action

action brought by the defendant against the prosecutor, but he was not asked any question on the part of the prosecution.

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v.

BROOKE.

Scarlett, for the defendant, insisted upon his right to cross examine him as a witness called for the plaintiff; and this being objected to on the part of the prosecution,

ABBOTT Ld. C. J. was of opinion, that in strictness the defendant was entitled to cross examine, and he was cross examined accordingly.

The defendant was afterwards acquitted upon the merits of his case.

Denman for the prosecution.

Scarlett for the defendant.

DOE on the Demise of ROBINSON v. BARTON.

Feb. 26.

THIS was an ejectment brought to recover some premises situate in the parish of *Mary-le-bone*. In order to prove the order of the Insolvent Debtors' Court

for the discharge of a debtor, it is not sufficient to produce and prove the order to the marshall for the discharge of the debtor, reciting the judgment. The original entry of the judgment by the Court ought to be produced.

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DOE on dem.
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v.
BARTON.

The premises in question had been let on a lease for years, by Mr. Alderman *Wood*, the owner, to one *Stodhart*, who had been discharged under an insolvent debtors' act, and the lessor of the plaintiff claimed by virtue of an assignment from *Jeyes*, the provisional assignee, under the act. In order to prove their title, the execution of an assignment by *Stodhart*, the insolvent, to *Jeyes*, the provisional assignee, was proved; but this, as it was unstamped, could not operate as an assignment otherwise than by virtue of the act; the plaintiff was therefore under the necessity of proceeding further to prove, that the Court of Insolvent Debtors had adjudged that *Stodhart* was entitled to his discharge under the act. In order to prove this, a clerk in the Insolvent Debtors' Court was called as a witness, who produced a document which he said was under the seal of the Court, which recited, that the Court had adjudged, that the debtors should be discharged, and purported to be an order to the marshal for his discharge from custody. It appeared also, that a book was kept by the Court, and that upon any adjudication that a party should be discharged, the word *discharged* was written in the book under his name.

ABBOTT Ld. C. J. was of opinion, that this evidence was insufficient to prove the judgment of the Court. If it had appeared in evidence that it was not the practice to make any entry of the judgment, parol evidence might have been given of it; but it appeared that the judgment was enter-

ed in a book, and that book would have been evidence if there had been no other. A similar difficulty had occurred in a recent case. There were two acts, by one of which it was directed that the names of the creditors should be inserted in the order of discharge. By the second it was provided, that the names of the creditors need not be named in the adjudication, but that the schedule might be referred to, which contained them. The present document was insufficient to prove the order of discharge, since it merely recited that the Court had so adjudged; it was nothing more than a copy of the order addressed to the marshal for the purpose of the prisoner's discharge, and the original order could no more be proved by means of such a document than a judgment could be proved by a writ in which it was recited.

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 BARTON.

Plaintiff nonsuited.

Scarlett and Holt for the plaintiff.

Gurney for the defendant.

PENNIFORD v. HAMILTON.

THIS was an action for work and labour upon a bricklayer's bill.

In an action
 for work and
 labour, a pro-

posal on the part of the defendant, which was not finally acceded to, containing an estimate of the amount of the work, may be read in evidence by the defendant, although it be not stamped.

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PENNIFORD

v.

HAMILTON.

A proposal on the part of the defendant to him purporting to be an estimate of the expence of building the wall was tendered in evidence. It was entitled, "An estimate for building the garden wall," &c. and it stated the dimensions of the wall, and specified that such doors were to be made as might be required, the whole to be done by the plaintiff, finding labour and scaffolding only, for 195*l*. This estimate had not been finally agreed upon, but was offered in reduction of the plaintiff's demand, and to prove that, according to his own estimate, he was not entitled to so much as he claimed.

Scarlett, on the part of the plaintiff, objected that this document could not be received in evidence without a stamp, and that it was not within the exception in the act.

ABBOTT Ld. C. J. was of opinion, that being a mere proposal and estimate, no stamp was requisite, and the document was read.

Scarlett and *Comyn* for the plaintiff.

Marryatt and *Resden* for the defendant.

IN THE KING'S BENCH,

After Hilary Term,

59 GEORGE III.

ADJOURNED SITTINGS AT GUILDHALL.

DOE on the Demise of the Drapers' Company v.
WILSON.

THIS was an action of ejectment brought on a demise by the Drapers' Company.

It was admitted on the part of the defendant, that the plaintiff was entitled to recover the ground floor, and also the first and second floors of the house, in respect of which the ejectment was brought; but it was contended that he was not entitled to the upper part of the house, and evidence was offered in proof of this; but

After the plaintiff, in ejectment, has proved his title to a verdict, the Court will not try the question of the precise extent of the plaintiff's claim as defined by particular metes and bounds.

ABBOTT Ld. C. J. said, that in an action of ejectment, where it was admitted that the plaintiff was entitled to recover a part of that which he claimed, a question of boundary could not be tried. The generality of the description of the premises in an action of ejectment, precluded an inquiry

K K S

as

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as to the precise quantity which the party was entitled to recover. If he took too much on the execution of the writ of possession, the defendant might bring an action of trespass, in which the premises might be set out by metes and bounds; the action of ejectment decided nothing as to the *quantum*. (a)

Verdict for the plaintiff.

Marryatt and Tindall for the plaintiff.

Gurney and Chitty for the defendant.

(a) It is at the peril of the plaintiff to take out execution for that only to which he is entitled, and he must point out to the sheriff the premises of which he is to deliver the possession; see 1 Burr. 366. 629. And if he takes possession

of more than he is entitled to, the Court will, in some instances, interfere in a summary way to set the matter right. 1 Burr. 629. *Saul v. Dawson*, 3 Wils. 49. *Runnington on Eject.* 432.

ELLIS and Another v. WATSON and two Others.

An entry by A.
at the Excise
Office of pre-
mises for the
keeping of beer

THIS was an action of assumpsit against *Watson, Elgie, and Worthington*, and the only question was, whether *Worthington*, at the time for home consumption and exportation, in the name of himself, B. and C., is conclusive against A. as far as regards the Crown, but is not conclusive with respect to other parties.

when

when the cause of action accrued, was a co-partner with the other defendants.

In order to establish the co-partnership of *Worthington*, the plaintiffs proved that *Worthington* had entered the cellar in which the business had been carried on at the Custom-house, in the joint names of himself, *Watson*, and *Elgie*, as premises for the keeping of beer for home consumption and for exportation; and that he had afterwards also caused a withdraw to be entered in their joint names. On the part of *Worthington*, evidence was offered to shew that he was not in fact a co-partner with the other defendants, but that he had been employed by them merely as a cellar-man, at weekly wages.

On the part of the plaintiffs, it was contended, that *Worthington* was concluded, by the entries which he himself had made.

ABBOTT Ld. C. J. was of opinion, that the defendant *Worthington* was not in his present defence concluded by the entries in question. With respect to the Crown, he would certainly have been bound by the representation which he had made, but with regard to other parties, although the evidence was admissible, it was not conclusive.

Verdict for the defendants.

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and two
Others.*Scarlett and Hutchinson for the plaintiffs.**Campbell for the defendant Worthington.*

As to the effect of a man's acts or representations by way of admission against himself. See *Watson v. Threlkeld*, 2 Esp. 367. *Robinson v. Nahon*, 1 Camp. 245. *Meredith v. Hodges*, 2 N. P. 453. *Morris v. Miller*, Burr. 2057. *Mace v. Cadell*, Cowp. 232. *Edwards v. Brydges and another*, *supra*, 232. *Chorley v. Bolcott*, 4 T. R. 317. *Lipscomp v. Holmes*, 2 Camp. 441. *Nash v. Turner*, 2 Esp. 117.

HUPE v. PHELPS.

One who professes to cure disorders within a specific time by means of sovereign medicines, and induces another to employ him by false and fraudulent professions of his skill, cannot recover for medicines or attendance.

THIS was an action of assumpsit brought to recover for medicines supplied by the plaintiff to the defendant's wife, and for his attendance upon her for the purpose of curing a cancer.

The plaintiff who was a native of *Germany*, and had advertised himself as famous for the cure of cancers without cutting, had been called in to attend the defendant's wife in the beginning of *April* 1818, and undertook to remove a cancer in her breast, with which she was afflicted, without cutting.

In

In the beginning of *May*, the plaintiff brought in a bill to the amount of 12*l.* for medicines only, which was paid to him, but Mrs. *Phelps* having at that time derived no benefit whatsoever from the lotions and internal medicines which had been applied, the defendant was particularly questioned as to the probability of a cure by such means, and as to his success with other patients who had been afflicted with similar complaints, when the plaintiff assured the defendant, that the cure was then considerably advanced, that a very material alteration for the better had then taken place, and that he should be able to effect a complete cure within a very short time, without cutting, and, in proof of his skill, he referred to two patients who were still under his care, but in a very advanced state of recovery. Notwithstanding these assurances, Mrs. *Phelps's* cancer daily grew worse, till at last she had recourse to surgical aid, and, after undergoing a most painful operation, which delay had rendered more painful and more dangerous than it would have been, had it been performed at an earlier stage of the complaint, she recovered. It turned out upon inquiry, that both the patients whom the defendant had represented to be so rapidly advancing in their recovery, had daily grown worse whilst they were under the plaintiff's hands, and had since died, and that there was reason to suppose that their deaths had been accelerated, in consequence of the plaintiff's treatment. On the part of the defendant, it was contended that the plaintiff could not recover,

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v.

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1. In-

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1. Inasmuch he had not been examined and approved of as is required by the statutes 3 *H.* 8. c. 11. § 1. 14 & 15 *H.* 8. c. 5. § 3. 34 & 35 *H.* 8. c. 8. & 55 *Geo.* 3. c. 194. (a)

(But ABBOTT Ld. C. J. having intimated his opinion, that the question arising upon these statutes was too doubtful to be decided at *Nisi Prius*,) it was contended,

2. That the plaintiff was not entitled to recover, since he had, in fact, rendered no beneficial service to the defendant, but, on the contrary, had practised a gross fraud upon him.

ABBOTT Ld. C. J. in summing up to the jury, informed them, that as the plaintiff had not charged for his attendance in his first bill, he could not insist upon being paid for it afterwards. That as to the charge for medicines, the question for their consideration was, whether the plaintiff had not induced the defendant to allow him to go on by making false and fraudulent pretensions of his ability to effect a cure, and of the state of his other patients. In the case of a regular practitioner, who had used due care and diligence, his claim to remuneration did not depend upon the question whether he had effected a cure; he would be entitled to be paid for his services although he

(a) See *Gremare v. Le Clerc Bois. Valon.*, 2 Camp. 144.

was unsuccessful; but that the case of a man who was not a regular practitioner, but who professed to be able to effect a cure by means of sovereign medicines within a specified time, was widely different; such a plaintiff stood in a very different situation; and the question was whether the plaintiff, in the present instance, had not induced the defendant to permit him to proceed by means of fraudulent representations.

Verdict for the defendant.

Gurney and Comyn for the plaintiff.

Scarlett and Starkie for the defendant.

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v.

PHELPS.

YORK SPRING ASSIZES, 59 GEO. III.

REX v. TELICOTE.

THIS was an indictment against the prisoner for stealing a heifer.

In the course of the evidence for the prosecution, the prosecutor offered the confession of the prisoner before two magistrates; taken under the statutes of *Philip & Mary*.

After the examination of a prisoner before a magistrate upon a charge of felony has been taken down by the magistrate's clerk,

it is read over to him, and he is told that he may sign it or not, as he chooses; having declined to sign it, the examination cannot be read in evidence.

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The clerk of the magistrate stated, that he took down the examination from the mouth of the prisoner, and that it was afterwards read over to him, and he was told that he might sign it or not as he chose, and that he declined to sign it.

Sinclair, for the prisoner, objected to the reading of the examination under these circumstances, on the ground that it was not a complete examination, under the statutes of *Philip & Mary*.

Raine, for the prosecution, contended that the examination might be read, the statutes of *Philip and Mary* did not prescribe any particular form of examination, nor require that it should be signed by the prisoner ; and in *Lambe's* (a) case it had been held, that the examination was evidence although the prisoner had refused to sign it ; but

WOOD B. was of opinion, that the document could not be read : in *Lambe's* case the prisoner, when the examination was read over to him, said that it was true ; and here if the prisoner had said so, the case might have been different.

The evidence was accordingly rejected.

Raine and *Parke* for the prosecution.

Sinclair for the prisoner.

(a) Leach, C. C. L. 625. 3d edition.

CARLISLE ASSIZES.

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REX v. ROBINSON.

THE prisoner was indicted for stealing from the possession of one *Matthew Dobson*, he the said *M. D.* being a person employed to convey letters sent by the post of *Great Britain*, to wit, by the post from *Wetherby* to and from *Harrowgate* and *Knaresborough*, four bags of letters sent by the post, &c. against the form of the statute, &c.

The second count charged the prisoner with stealing one *mail of letters*, &c.

The horse mail bags being left by the mail rider, after he had taken possession of them, for a temporary purpose for two minutes, were stolen during his absence, the case is within the st. 52 G. 3. c. 143. s. 3.

It appeared on the evidence, that the person mentioned in the indictment (*Matthew Dobson*) was the mail rider from *Wetherby*, *Harrowgate*, and *Knaresborough*, and that on the morning of *January 30.* he had fixed the mail portmanteau on the saddle of his horse, containing the four bags of letters, and slung the bridle of his horse on a staple at the stable door of the post-office, about thirty yards from the door of the house; he then went into the house to put on his great coat, and staid two minutes; in the interval the robbery took place.

On the part of the prisoner it was contended,
that

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that the offence did not come within the meaning of the stat. 52 *Geo. 3. c. 143. § 3.* the words of which are, “ If any person shall, after the passing
 “ of this act, steal and take from any carriage, or
 “ from the *possession* of any person employed to
 “ convey letters sent by the post of *Great Britain*;
 “ or from or out of any post-office, or house or
 “ place for the receipt or delivery of letters, or
 “ packets, or bags, or mails of letters, sent, or to
 “ be sent, by such post,” &c. since this was not
 a stealing from the *possession* of *Matthew Dobson*.
 That by possession, as the word was used in this
 statute, was meant actual possession. The first
 part of the clause in question related to a taking
 from a carriage; but in order to bring an offender
 within those words, there must be a taking actually
 from the carriage, if the taking was from the road
 by the side of the carriage, it would not be suffi-
 cient; and therefore, by analogy, the taking from
 the possession, must mean the actual possession.
 If it were sufficient to be within thirty yards,
 why would not 300 or 3000 yards suffice. If it be
 merely sufficient, that the person entrusted has the
animus revertendi, where would be the limit? If
 he staid forty minutes in a house to dine, would
 that be sufficient? Penal statutes, and especially
 statutes so penal as this, have always been con-
 strued strictly. The stealing a purse from under the
 pillow of the owner had been held not to be within
 the statute of *Anne*, against stealing in a dwelling-
 house, because it was under the protection of the
 person

person and not of the house. (a) A similar distinction was applicable in this case, the robbery was not from the person; the mail might rather be considered as under the protection of the house, or of the postmaster. The stealing must be from the presence of the person employed, it could not be said to be from his possession when he was not present, as if he went to the ale-house to drink, or a mile upon business.

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ROBINSON.

Topping, Raine, and Eden, for the crown, admitted that it might be so, as had been contended, with respect to stealing from a carriage; but that, in the present instance, the mail was to be considered as in the possession of *Dobson*; the postmaster had parted with the possession, and they

(a) I have been informed, that it was once held by *Cbambre J.* at the *Lancaster assizes* that the stealing money from the breeches of the prosecutor, in a dwelling-house, from under his pillow whilst he was asleep, was not a capital offence; as stealing to the amount of 40s. in a dwelling-house, within the statute of *Ann.* This case seems, however, to be very distinguishable from those where the property was under the special personal protection of the owner, and not of the house, as in *Campbell's case*, 2 Leach, 642. 3 E. P. C. 644. where the prisoner obtained possession of a Bank note, in the dwelling-house of the owner, under pretence that he would get it changed, and as in the cases of

Owen and of *Castledine*, East's P. C. 645., in which the parties were decoyed into houses, where they were tricked out of their property by false pretences. In those cases the property was under the special protection of the owner, and derived no additional protection from the dwelling-house. But in the case of stealing a purse from under the pillow of a sleeping person, if it were to be admitted, that the property can with propriety be said to be under the protection of a person asleep, it is difficult to say that it is not also under the protection of the dwelling-house. Qu. Whether both the sleeping owner and his property are not to be considered as under the protection of the dwelling-house.

assimilated

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assimilated the case to that of a bailee or a waggoner.

Williams in reply. 'The case of the waggoner depends upon his liability over to the owner; that is a case of proprietorship, and, according to that argument, there would be no limit in respect of distance; the proper limit is that of personal presence; according to the argument, the mail would be equally in the possession of the postmaster.

WOOD B. I am of opinion, that there is no solid ground of objection; the charge is, that the prisoner stole the bags from the possession of *Matthew Dobson*. The facts are, that the mail rider had actually taken possession of the bags, and had strapped them upon the horse, he then went into the house. The act seems to have made it unnecessary to steal from the person, it does not say from the person but from the possession, and is therefore more general. The person employed had possession in the first instance, had he then abandoned that possession? if the bags were not in his possession when they were stolen, in whose possession were they? It might as well be contended, that if he got off his horse on the road for any occasional purpose, and the bags were then to be stolen, the stealing of them would not be within the act. The cases of stealing in a dwelling house, and of stealing privately from the person, are very distinguishable. I have no doubt that

that he had the possession, and therefore the objection is overruled.

The prisoner was convicted.

Topping, Raine, and Eden, for the crown.

Williams for the prisoner.

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v.

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LANCASTER SPRING ASSIZES, 59 GEORGE III.

REX v. FERGUSON and EDGE.

THIS was an indictment against the defendants for a conspiracy.

Form of an indictment against workmen for a conspiracy against their employers.

The first count alleged, that the defendants, with divers other evil-disposed persons, to the jurors unknown, on the 29th day of *September*, and on divers other days and times next following, in the 58th year of the reign, &c. at *Manchester* in the county of *Lancaster*, being journeymen and workmen in the trade, mystery, and manual occupation of engravers, in the employment of *Samuel Davenport* and *Robert Fayle*, did conspire, combine, confederate, and agree together, to prevent, hinder, and deter their said masters and employers from retaining and taking into their employment *any* person as an apprentice, to be taught and instructed,

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v.

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and EDGE.

structed in the said trade and occupation, to the great damage of their said masters and employers, to the evil example of all others, in the like case offending, and against the peace of our said lord the king, his crown and dignity.

In the second count, it was alleged that the defendants, together with other evil-disposed persons, afterwards, to wit, on, &c. at, &c. being such journeymen and workmen as aforesaid, in the employment of the said *Samuel Davenport* and *Robert Fayle*, maliciously intending to hurt, injure, and impoverish their said employers, and to prevent them from retaining any other journeymen and workmen, and retaining and instructing apprentices in the said occupation, did conspire, combine, confederate, and agree to quit, leave, and turn out from their said employment, at one and the same time together, to the great damage, &c.

In a third count, it was alleged, that the defendants, together with the said other evil-disposed persons afterwards to wit, on, &c. at, &c. being, such journeymen and workmen as aforesaid, in the employment of the said *Samuel Davenport* and *Robert Fayle*, maliciously intending to controul, injure, terrify, and impoverish their said employers, and force and compel them to dismiss from their said employment divers persons then and there retained by them, as journeymen, workmen, and apprentices therein, unlawfully did conspire, combine, confederate, and agree, to quit, leave, and turn out from their said employment, until the said last mentioned journeymen, workmen, and apprentices

apprentices should be dismissed by their said masters and employers, to the great damage, &c.

It appeared, that upon the prosecutors taking into their employment a young person of the name of *Green* as an apprentice, the defendants, together with a number of journeymen, declared to the prosecutors that they would not stand it, and after consultation left their work, and that *Edge's* agreement was given up to him, and he went away. The rest of the workmen were conciliated for the time, by the prosecutors agreeing to relinquish *Green* the apprentice. Sometime afterwards, *Ferguson* and the other workmen again turned out, upon the prosecutors taking into their service another apprentice of the name of *Merone*. At the time of these turn-outs, the prosecutors had in their employment sixteen journeymen and eight apprentices, and it appeared upon the cross-examination of one of the prosecutors, that the objection which had been made by the defendants and their associates, did not apply to the eight apprentices, which the prosecutors then had in their employment, but that they objected to the prosecutors taking a greater number of apprentices than half the number of journeymen.

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and Edge.

It was objected on behalf of the defendants upon this evidence, that it varied from the indictment, which alleged generally a conspiracy to prevent the masters from taking into their employment *any* apprentices, &c. ; whereas it should have been alleged according to the fact, to be a conspiracy, to hinder their masters from taking into

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v.

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and EDGE.

their employment any *more* apprentices, or a number exceeding half the number of journeymen; but,

WOOD B. was of opinion, that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking into their employment any person as an apprentice, to be taught and instructed, as alleged in the indictment.

The defendants were both found guilty.

Scarlett, Cross Serjt. and *Starkie* for the prosecution.

Williams and *Holt* for the defendants.

When the defendants were brought before the court of K. B. for judgment in the ensuing term, the objection was renewed, but the Court were of opinion, that the indictment was sufficiently proved; and it was intimated, that the evidence applied to the third count as well as the first, since in order to support the third count, it was sufficient to prove, that the defendants turned out from their employment with intent to compel their masters to dismiss any one apprentice.

The defendants received sentence of fine and imprisonment.

1819.

IN THE KING'S BENCH.

SITTINGS AFTER EASTER TERM, 59 GEORGE III.

SPEIGHT v. OLIVIERA.

May 25.

THIS was an action on the case brought by the plaintiff to recover damages for the seduction of his daughter and servant by the defendant.

The plaintiff it appeared was a carpenter, and his daughter, who was of the age of twenty-three, had lived as a servant in several families. After she had left her last place, she lived in her father's house seven weeks, and rendered him service in domestic matters. During that period, she inserted an advertisement in one of the public papers, in order to procure for herself the situation of lady's maid. The defendant, who it appeared was a person of fortune, in consequence of this advertisement applied to her, informing her, that his sister was in want of a maid, and that he wished to engage her in that capacity for his sister. In a day or two he called again and informed her, that

A., with intent to seduce the servant and daughter of *B.* hires her as his servant, and by this means obtains possession of her person. *B.* may maintain an action against *A.* for such seduction.

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SPEIGHT

v.

OLIVIERA.

his sister was about to travel abroad, and that she (the daughter) would be too young to take care of his sister's clothes. He afterwards proposed that she should take care of an empty house for him in *George-street*, at 7s. per week wages, which she agreed to do, and went accordingly. The defendant afterwards proposed to advance the sum of 200l. to enable her to procure the situation of an assistant in some shop, and prevailed upon her to leave the house in *George-street* with him, in order to procure such a situation; instead, however, of doing so, he carried her to a brothel, where he seduced her, and she afterwards had a child by him. There was evidence tending to shew, that the house in *George-street*, had been kept as an empty house for such purposes. The daughter remained in the defendant's house, and received her wages for several months.

Gurney, for the defendant, objected that the plaintiff was not entitled to recover. The action was brought by the plaintiff to recover damages for the loss of his daughter's services; but upon the evidence it appeared, that the daughter was in the service of the defendant himself, having engaged to take care of his house, and having received wages for many months.

ABBOTT Ld. C. J. It will be a question for the consideration of the jury whether the daughter was withdrawn from her father's house by the defendant under a *bona fide* contract for her services, in taking

ing care of the defendant's house, or the whole was a pretence and contrivance for the purpose of gaining the possession of her person. If she was the servant of the defendant, the action certainly cannot be maintained; but had she ceased to be the servant of her father? If the jury be of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house without any real intention to hire her as a servant, I am of opinion that the action is maintainable.

1819.
SPRIGHT
v.
OLIVIERA

Gurney then objected, that the form of action should have been trespass and not case; and referred to a case which had lately been decided in the Court of Common Pleas; but

ABBOTT *Ld.* C. J. said, that he would not nonsuit upon that objection. Afterwards, in summing up to the jury, his lordship said, during the time that she was in her father's house she was his servant; was there an end put to that service? It is alleged by the defendant, that there was, because he himself hired her for the purpose of keeping his own house at the rate of 7s. *per week*; but if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion, that the relation of master and servant was never contracted between them, and that if you believe the witnesses, your verdict ought to be for the plaintiff.

1819.

SPEIGHT

v.

OLIVIERA.

After his lordship had commented fully upon the facts of the case, the jury found a verdict for the plaintiff.

Damages 200*l.* (a)

Scarlett and *Holt* for the plaintiff.

Gurney and *Puller* for the defendant.

(a) Although the courts, with an honourable zeal, lend every legitimate aid within their reach to give such reparation as pecuniary damages can bestow for injuries of this nature; it is still to be lamented that instances not unfrequently occur, where such injuries still remain without redress. The claim to damages in such cases, which is founded upon principles of strictest justice, the enforcement of which

is absolutely essential to curb licentiousness and preserve the morals of society, ought not to depend upon a mere fiction, over which the courts possess no control. It is a reproach to the law of England, that the right to damages should not be necessarily consequent upon the injury. — Surely it is worthy the attention of the Legislature to find a remedy for an evil of such magnitude.

1819.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN C. P.

After Trinity Term,

59 GEORGE III.

SITTINGS AT GUILDHALL.

COOPER *v.* Dame TURNER, Widow.

THIS was an action of assumpsit, brought by the plaintiff, a coachmaker, for work and labour, &c.

The defendant had pleaded the general issue. 2dly. The statute of limitations. 3dly. A set-off for money lent by her to the plaintiff, and a partner since deceased. 4thly. A set-off for money lent to the plaintiff. The plaintiff had taken issue upon these pleas.

Evidence was given tending to shew, that the defendant had in the year 1806, lent to the plain-

Assumpsit and plea of set-off for money lent by the defendant to the plaintiff. Replication, denying the set-off. It appears that the loan took place 13 years ago. Although the statute of limitations is not a legal bar to the action,

the jury may presume from length of time and other circumstances, that the debt has been satisfied.

tiff

1819.

COOPER

v.

TURNER.

tiff and his three partners, the sum of 50*l*. The first item of the account upon which the plaintiff insisted arose in 1814.

On the part of the plaintiff, it was insisted, that although the plaintiff had not explained the statute of limitation to the defendant's plea of set-off, yet that the jury might presume, from lapse of time, that the debt had been satisfied.

DALLAS C. J. in summing up to the jury, told them, that although there was strong evidence to shew that the sum of 50*l*. had actually been advanced in the year 1806, by the defendant to the plaintiff and his then partner, it was for them to consider whether, after so great a length of time, the debt had not been satisfied; and the jury found for the plaintiff for the whole of his demand.

Vaughan Serjt. and *Starkie* for the plaintiff.

Copley Serjt. and *Hutchinson* for the defendant.

IN THE KING'S BENCH,

After Trinity Term,

59 GEORGE III.

FIRST SITTINGS AT GUILDHALL.

AGUTTAR and Another v. MOSES.

THIS was an action by the plaintiffs as the payees, against the defendant, as the acceptor of a bill of exchange.

In the introductory part of the declaration, which was by original, the plaintiffs were described as the executors and trustees of *William Nunn*, carrying on trade under the name and firm of *Nunn and Co.* The declaration then alleged the drawing the bill in question, by *Philipson*, on the defendant *Moses*, whereby he requested him to pay to the plaintiffs, by the name and addition of *William Nunn and Co.* or order, the sum of 156*l.* 15*s.* six months after the date.

It was proved, that the plaintiffs, Mr. *Aguttar* and Mr. *Bovil*, did carry on the trade of the late Mr. *Nunn*, under the style and firm of *William Nunn and Co.*, and the acceptance of the bill was proved.

An introductory description in the declaration by the plaintiffs the payees of a bill of exchange, in an action against the acceptor, representing them as the executors and trustees of a person deceased, is mere surplusage, and does not require proof, the bill being in fact payable to them in the name of a firm which they had assumed.

It

1819.

AGUTTAR
and Another
v.
MOSES.

It was objected, on the part of the defendant, that it was necessary that the plaintiffs should prove themselves to be the executors and trustees of *William Nunn*, as they were described in the declaration, by the production of the probate; but,

ABBOTT Ld. C. J. held, that the introductory representation of the character of the plaintiffs was merely surplusage, and required no proof.

Verdict for the plaintiff.

Bolland for the plaintiff.

Jones for the defendant.



IN THE KING'S BENCH,

After Trinity Term,

59 GEORGE III.

WESTMINSTER SECOND SITTINGS.

BAKER v. KEEN.

Tuesday,
July 6.

THIS was an action of assumpsit, brought to recover the sum of 72*l.* for regimentals supplied to the son of the plaintiff. *See*

It appeared, that in the year 1812, the son of the defendant, who had been for some years previously a pupil at the military college at *Harlow*, and was then a minor, left that seminary, and was gazetted as an ensign in the 98th regiment. About the same time, a young man, who represented himself to be the son of the defendant, and accompanied by a lady, who described herself as the defendant's wife, procured in the defendant's name the articles, the price of which was the subject of the action from the plaintiffs, who were manufacturers in *London*, to fit out the young man for the *East Indies*. The defendant, at that time resided at *Dawlish* in *Devonshire*. It appeared also, that a letter had been written to the defendant by the plaintiff

Where a minor orders articles which are necessary and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given to that effect by the father.

1819.

BAKER

v.

KEEN.

plaintiff on the subject of the present claim, and that an answer had been received, but it was not produced.

Scarlett, for the defendant, objected that there was no evidence of any authority from the defendant for the purchase of these articles. That the law did not give any authority to a son to bind his father by any contracts which he made, and would not, in such a case, imply an authority from the father. If a husband, indeed, turned his wife out of doors, he was liable for necessaries supplied to her ; to that extent the law would imply an authority from the husband, but the law, he submitted, would not tolerate a tradesman in taking directions from a son, and bringing an action against the father after a lapse of six years.

ABBOTT Ld. C. J. left two questions for the consideration of the jury :

1. Whether the young man who ordered the regimentals, was in fact the son of the defendant; and, after stating the evidence upon this point,

2. Whether they could infer, that the order was given by the assent and with the authority of the father. A father would not be bound by the contract of his son, unless, either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent, it was there-

therefore necessary, that some proof should be given, that the order of a son was made by the authority of his father. The question therefore for the consideration of the jury was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at *Harlow*, and had paid his expenses whilst he remained there. The son, it appeared, then obtained a commission in the army, and having found his way to *London* at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the *East Indies*. If it had appeared in evidence, that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, the circumstance might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing, however, of this nature had been proved, and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied, that an authority had been given by the defendant. After his lordship had fully commented upon all the circumstances of the case, and left the two questions already stated to the jury, they found for the plaintiff.

1819.

BAKER

v.

KEEN.

Marryatt

1819.

BAKER
v.
KEEN.

Marryatt and Turton for the plaintiff.*Scarlett* for the defendant.

Wednesday,
July 7.

CLARKE v. BURDETT, Bart. and Another.

In an action against the hundred, on the stat., to recover damages for mischief done to a dwelling-house by a mob, it is not necessary to shew, that the object of the mob was seditious.

THIS was an action brought by the plaintiff under the stat. 57 G. 3. c. 19. s. 38. against the defendants, being two of the inhabitants of the hundred of *Ossulston*, to receive a compensation for the injury done to his house by a mob.

It appeared in evidence, that on the termination of a late election in *Covent-garden* of a member of parliament for *Westminster*, a great mob had attacked the houses of several persons supposed to be in the interest of the successful candidate, and had broken their windows and done other damage; and that amongst other houses, they had attacked that of the plaintiff, situate in *Castle-street*.

Blackburn, on the part of the defendants, objected, that the injuries contemplated by the statute in question were such as were to be effected by a mob assembled for seditious purposes, and that the statute did not extend to the case of a mob like the present, since the preamble and former sections
of

of the statute related to mobs *assembled for* such purposes.

1819.

CLARKE

v.

BURDETT
and Another.

ABBOTT Ld. C. J. was of opinion, that the stat. extended to all cases where the injury was effected by a mob, whatever was its object. It was by no means uncommon, where the legislature had a particular object in view in making a particular statute, to extend the enactments beyond the immediate and original object, and apply it to other matter suggested by it. In the present case the section which related to seditious practices was quite distinct from the clause which gave the present remedy.

Scarlett and Alderson for the plaintiff.

Blackburn and Evans for the defendants.

JONES v. HALL.

Thursday,
July 8.

THIS was an action upon a bill of exchange.

The counsel for the plaintiff having called a witness to prove the handwriting of a party to the bill, the witness stated, that he believed, that the handwriting shewn to him was not that of the party; upon which the counsel for the plaintiff stated, that he must be nonsuited.

After a plaintiff in the course of a cause has submitted to be nonsuited, the counsel for the defendant cannot put any further question to a witness.

1819.

JONES
v.
HALL.

The counsel for the defendant, proposed to put a question to the witness before the plaintiff was called; but

ABBOTT Ld. C. J. would not permit the question to be put, he was there to try the cause, and there being an end of that, no further question could be put to a witness.

The plaintiff was then nonsuited.

KEENE v. PARSONS.

A surgeon and apothecary having agreed with a father to take his son as an apprentice in consideration of a premium; after the son has served for seven months, the agreement is broken off on account of the refusal of the former to pay the expence of the stamp for the indentures. The master cannot recover damages for breach of the agreement; nor can he recover as for the board and lodging of the son.

THIS was an action of assumpsit, brought by the plaintiff, who was a surgeon and apothecary, against the defendant, for breach of an agreement by the defendant, in consideration that the plaintiff would take his son as an apprentice for five years, to pay him the sum of 300*l.* by instalments.

It appeared, that the son of the defendant had been sent to the plaintiff's, and had remained with him seven months, during which time he had served the plaintiff as an apprentice, and had been found in board and lodging. It appeared also that the defendant had come to town twice, to have the indentures executed at Surgeons'-hall, but that the plaintiff had not attended, insisting that the

expences

expences of the stamp ought to be borne by the defendant.

1819.

KEENE

v.

PARSONS.

ABBOTT Ld. C. J. said, that as to the expence of entering at Surgeons'-hall, it probably might fall upon the father, but that by the stat. 8 Ann c. 9. § 32. the expence of the stamp was thrown upon the master.

It was then contended, that the plaintiff was at all events entitled to recover for the board and lodging of the defendant's son whilst he was with the plaintiff; but

ABBOTT Ld. C. J. held that under the circumstances, he was not entitled to recover any thing.

Plaintiff nonsuited.

Gurney for the plaintiff.

Marryatt and Shutt for the defendant.

VINCENT v. SHARP, Administratrix, &c.

ASSUMPSIT against the defendant as administratrix to her late husband, plea, *plene administravit*.

A lease which belonged to an intestate, upon which the plaintiff has a

lien, on account of which he retains it in his hands, is nevertheless to be considered as assets in the hands of the administrator, who has the power to redeem it.

1819.

VINCENT
v.
SHARP.

The plaintiff had an assignment of a lease in his possession which had been deposited with him by the intestate, upon which he had a lien.

On the part of the defendant it was contended, that so long as the lease remained in the hands of the plaintiff undisposed of, the value of it could not be considered as assets in her hands.

ABBOTT Ld. C. J. But the legal estate was in her ; if she had done what she was desired to do, the lease might have been sold.

Verdict for the plaintiff.

Scarlett and Chitty for the plaintiff.

E. Lawes for the defendant.

KERSLAKE v. WHITE.

By the demise of a messuage with all rooms and chambers thereto belonging and appertaining, is to be understood all that is occupied to-

TRESPASS for breaking and entering the dwelling-house of the plaintiff.

The question which arose upon the pleadings was, whether under the demise of a messuage, with all the rooms and chambers, with the appurtenances

gether, as the entire messuage at one and the same time. And therefore such a demise will not comprehend a room, which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previous to the demise.

belonging

belonging or in anywise appertaining thereto, the particular room in which the trespass was committed passed.

1819.
 KERSLAKE
 v.
 WHITE.

This room had formerly been occupied with the rest of the defendant's house, and there had been a communication between them by means of a door, but this communication had been obstructed by a wooden partition for many years before the time of the demise, and had not been occupied with the rest of the house.

Scarlett, for the defendant, contended, that under this demise the room in question passed, and that if it had been the intention of the parties that this room should be excepted, it ought to have been excepted in express terms; on the contrary, the demise was of all rooms, &c. thereto belonging.

ABBOTT Ld. C. J. It appears to me that the term messuage denotes all that is occupied together at one and the same time, and no more. It frequently happens, that a room of one house extends over part of a room belonging to another house. This house had been occupied as a distinct and separate house for many years, and whatsoever communication there had been between the two had been long interrupted.

Verdict for the plaintiff, damages 5*l*.

1819.

KERSLAKE

v.

WHITE.

*Marryatt and Comyn for the plaintiff.**Scarlett for the defendant.*

• SHEPHERD v. BLISS and his Wife.

In an action for slander it is alleged, that the words were spoken of and concerning certain soap, alleged by A. B. to have been stolen. The declaration is not supported by evidence that the words were spoken concerning certain soap, alleged by A. B. to have been taken out of his yard.

THIS was an action against the husband and wife for slanderous words spoken by the wife of the plaintiff, charging him with having stolen some soap.

The declaration alleged, that the words had been spoken of and concerning certain soap, which *Bliss* had asserted to have been stolen out of his yard. It appeared in evidence, that *Bliss*, before the speaking of the words upon which the action was founded, had asserted that the soap had been taken out of his yard.

ABBOTT Ld. C. J. was of opinion that the variance was fatal.

The defendants, however, consented that a juror should be withdrawn.

1819.

REX v. Lord GROSVENOR and Others.

THIS was an indictment against the defendants for a nuisance in erecting a wharf on the river *Thames*, to the injury of the navigation of the river.

A corporation being the conservators of a river, and owners of the soil between high and low water mark, cannot authorise a lessee to erect a wharf there, which produces inconvenience to the public in the use of the river for the purposes of navigation.

It appeared that the corporation of the City of *London*, who were conservators of the river, were entitled to the soil of the river, and that they had let a space of ground at *Millbank* to Lord *Grosvenor*, for the purpose of erecting a wharf there for a fine of 400*l.* and a rent of four guineas *per annum*. The wharf in question had been erected between high and low water mark, and extended for a considerable space along the river. There had formerly been a recess there between two projections. Evidence was given on the part of the prosecution to shew that in the former state of the river the recess afforded a place of refuge in time of storm, and that the eddy water which it produced afforded great convenience for the passage of watermen.

On the part of the defendant, it was contended, in the first place, that the defendants, claiming a right of soil from the Corporation of *London*, who were the conservators of the river, had a right to make such an erection between high and low

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REX

v.

Lord

GROSVENOR
and Others.

water mark ; and that by the st. 14 *Geo. 3.* they were entitled to build wharfs and let them, provided this did not interfere with the navigation of the river.

ABBOTT *Ld. C. J.* Will you contend that you have a right to narrow the river *Thames* so long as you leave a space sufficient for the purposes of navigation ? It is impossible that you should derive any protection from the Corporation of the City of *London* as the conservators of the river. Although they have a right to the soil, they have no right to take a fine from a person who makes an erection for the benefit of the public. A great corporation professing to take a fine for that which is an advantage to the public, is a thing unheard of. If the erection be a nuisance, no protection can be conferred by a body which receives a pecuniary remuneration for permitting the erection.

It was then contended on the part of the defendants, and evidence was given tending to support that defence, that the erection of the wharf in question had been productive of advantage rather than of detriment to the navigation of the river. That the projection which had existed previously had occasioned an eddy which had caused a deposit of mud in the river, and a diversion of the stream, and that the embankment would tend to remove it, and thereby be of material benefit to the navigation, by removing any collection of mud.

mud. Evidence was also adduced for the purpose of proving that the recess which had formerly existed was a nuisance, and that it was not covered with water for eighteen hours out of the twenty-four, and that it could not be used as a place of refuge for large vessels, except at spring tides, and that it was made a place of resort by boys for the purpose of bathing.

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 Rex
 v.
 Lord
 Grosvenor
 and Others.

ABBOTT Ld. C. J. This is an indictment against Lord *Grosvenor* and others, for making an erection in the river *Thames* between high and low water mark. It is proper to premise, that if any person meditate an alteration in a public highway, or in any other subject matter which is of public right, the legitimate course of proceeding is by means of an inquiry before the Sheriff, in order to ascertain whether the change will operate to the prejudice of the public; and if any one undertakes to make a change without resorting in the first instance to this mode of inquiry, he incurs the burthen of proving, that what he does is not a nuisance to the public. The question here is, whether a public right has not been infringed. An embankment of considerable extent has been constructed for the purpose of building a wharf. Much evidence has been adduced on the part of the defendant for the purpose of shewing that the alteration affords greater facility and convenience for loading and unloading; but the question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether

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GROSVENOR
and Others.

whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river *Thames* has been affected or diminished by this alteration.

It appears that at each end of this embankment there is a projection towards the river, and it has been said, that this affords great convenience to the navigation, by producing an eddy. The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered. Again, it is said, that in stormy weather, vessels might have entered the recess and found shelter between the two projections at spring tides for some time, at neap tides for a shorter space of time; now, although they were not able to enjoy this benefit at all times, yet if they could derive benefit from it for the space of two hours each tide, they are entitled to that advantage, unless the want of it be compensated by some superior advantage resulting from the alteration. Another convenience afforded by the former state of the river has been proved, that is, that in the winter vessels have been able to avoid large masses of ice floating down the river by entering the recess.

The frequency of boys bathing in the river is an inconvenience which the conservators would do well to remove; but this at all events is not a nuisance at all seasons. The question is, whether if this wharf be suffered to remain, the public convenience will suffer. The witnesses for the prosecution speak from facts, those for the defendants from opinion.

opinion. Although the benefits which were enjoyed before the erection, were limited to particular times, and seasons of the weather, and were enjoyed but occasionally, yet the public is not to be deprived of them by the erection of a wharf for mere private convenience.

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—
Rex
v.
Lord
GROSVENOR
and Others.

The jury acquitted Lord *Grosvenor*, and found the rest of the defendants guilty.

Gurney and *Chitty* for the plaintiffs.

Scarlett, *Knowlys* C. S. and *Delany* for the defendants.

1819.

IN THE KING'S BENCH,

After Trinity Term,

59 GEORGE III.

ADJOURNED SITTINGS AT GUILDHALL.

Friday,
July 16.

RHODES v. LEACH.

In an action against the captain of an East Indiaman for assaulting a gunner's mate on board the ship, and causing him to be flogged, it is not competent to the plaintiff to give evidence as to his family and connections, unless they were known to the defendant at the time.

THIS was an action of trespass brought by the plaintiff who was the gunner's mate on board the *Orwell* East Indiaman, against the defendant, who was the captain. The defendant had pleaded a special justification, alleging that the plaintiff had been guilty of contumacy and insubordination on board the ship during her voyage homewards, wherefore the defendant as captain directed him to be punished, &c.

It appeared in evidence in the course of the cause, that the ship's provisions having failed, the crew were reduced to a very short allowance, and that the plaintiff having been reprimanded by one of the officers for not having obeyed the orders which had been given him to unshot the vessel before

before she proceeded up the *Channel*, the plaintiff complained of his bodily weakness, which he attributed to the want of a due supply of provisions, and threw out expressions of his great dissatisfaction. This language so irritated the defendant that he struck the plaintiff, and ordered him to be flogged, but the plaintiff rather than undergo the ignominy of this punishment, jumped into the sea, but was soon afterwards taken up again, and underwent the punishment of flogging.

1819.
RHODES
v.
LEACH.

The plaintiff's counsel, for the purpose of aggravating the damages, were proceeding to shew that the plaintiff was a person of considerable family and connections; but

ABBOTT Ld. C. J. was of opinion, that such evidence could not be received in aggravation, without first proving that the defendant was acquainted with the family and connections of the plaintiff, and the evidence was excluded.

On the part of the defendant, witnesses were examined as to acts, on the part of the plaintiff, of a mutinous tendency previous to the transaction in question.

ABBOTT Ld. C. J. said, that since an irregularity had already been committed on the part of the plaintiff in examining as to the plaintiff's general good conduct previously, he would not absolutely exclude

1819.

RHODES

v.

BRACH.

exclude the questions then put, but said that he should certainly inform the jury, that they were not to take into their consideration any past misconduct of the plaintiff, but merely whether the punishment was justified by the circumstances of the particular occasion upon which it was inflicted, for the plaintiff was not then to be punished in respect of any previous transgressions. And his lordship afterwards advised the jury accordingly.

The jury afterwards found a verdict for the plaintiff. Damages 500*l*.

Scarlett, Gurney, and Tindal for the plaintiff.

Marryatt and Puller for the defendant.

LANCASTER SUMMER ASSIZES, 59 GEORGE III.

JACKSON v. HESKETH.

Practice as to
the opening
and replying
of counsel in
trespass.

TRESPASS for breaking and entering the plaintiff's close.

The plea ran thus, and the said *Thomas Hesketh* by *T. W.* his attorney, comes and defends the force and injury, when, &c., and as to the force and arms,

arms, and whatever is against the peace of our said lord the king, saith, that he is not guilty in manner and form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country. And, for a further plea in this behalf, as to the breaking and entering the said closes of the said plaintiff, and with feet in walking, treading down, trampling upon, consuming, and spoiling the grass and corn of the said plaintiff, there growing and being in the said close, &c., and then proceeded to justify the alleged trespass, under a public right of way, upon which issues were joined.

1819.
 JACKSON
 v.
 HENRY.

After the pleadings had been opened, it was insisted by the counsel for the defendant, that he had a right to begin, since the affirmative of the issue lay upon the defendant, to prove the right of way as alleged in the plea. The practice in ejectment was referred to as analogous to the present; there if the lessor of the plaintiff claimed as heir at law, and the defendant as devisee, and the defendant admitted that the lessor of the plaintiff was the heir at law, the defendant was entitled to begin.

Cross Serjt., Fell and Starkie, for the plaintiff contended, that he was entitled to begin and to make the general reply, according to the usual practice. They urged that the general rule was, that the plaintiff was entitled to begin in all cases where any part of the proof, essential to the verdict, rested upon

1819.

JACKSON

v.

HESKETH.

upon him, and here he had a right to go into evidence to prove the extent of his damages. Besides this, the question was one which depended upon the form of the record, and here the affirmative of one of the issues lay upon the plaintiff.

BAYLEY J. after having consulted WOOD, B. upon the point, said that they were both of them of opinion that the defendant was entitled to begin. The denial of the force and arms, and whatever is against the "peace," in the old pleadings, was merely for the purpose of saving the fine to the king. The general rule was, that where the devisee the defendant admitted that the lessor of the plaintiff was the heir at law, the defendant was entitled to begin, so it had been held where the lessor of the plaintiff claimed under a will, and the defendant who claimed under a codicil admitted the will. In the case of *Revett v. Braham* (a) the question was, who was entitled to the reply in an action of ejectment, where the lessor of the plaintiff claimed as heir at law, and the defendant as devisee, and the Court (upon a trial at Bar) decided, that if the plaintiff proved his pedigree, and stopped, and the defendant set up a new case, which the plaintiff answered by evidence, which ultimately went to the jury, the defendant should have the general reply; and Buller J. said, that he had so ruled it in a cause at *Winchester* (b), the

(a) 4 T. R. 497.

(b) Doe v. Hicks, 1789.

practice in replevin was also adverted to; the party who had to prove the affirmative of the issue ought to begin; and where there were several issues, and the proof of one of them lay upon the plaintiff, he was entitled to begin. The question of damages never arose until the issue had been tried; in the present case there was but one issue to be tried; the denial of the force and arms was not with a view to the cause, but was introduced to bar the claim on the part of the crown, to a fine for the trespass, and was quite *dehors* the cause, as between the present parties; in practice nothing was ever found upon that issue.

1819.
JACKSON
v.
HESKETH.

The counsel for the defendant accordingly opened his case, and called witnesses, and after witnesses had been called for the plaintiff, the plaintiff's counsel replied.

Verdict for the defendant.

Cross Serjt. Fell and Starkie for the plaintiff.

Scarlett and Addison for the defendant.

1819.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

After Michaelmas Term,

60 GEORGE III.

SITTINGS AFTER TERM AT WESTMINSTER.

December 2.

BURTON v. CHATTERTON.

An attorney cannot maintain an action for preparing an affidavit of debt or bond to the Lord Chancellor with a view to sue out a commission of bankrupt, unless a bill has been delivered pursuant to 2 G. 2. c. 23. s. 23.

THIS was an action upon an attorney's bill.

It appeared that the defendant had employed the plaintiff to sue out a commission of bankrupt against a person of the name of *Preston*, and that the plaintiff had in consequence prepared a bond to the chancellor, and the affidavit for the purpose of suing out a commission, but that this object had afterwards been abandoned. A copy of the plaintiff's bill had been delivered, but it did not appear that it had been delivered a month before the commencement of the action, according to the stat. 2 G. 2. c. 23. s. 23.

It was objected, on the part of the defendant, that the delivery of a copy of the bill was necessary

sary previous to the bringing of the action ; and his counsel relied upon the cases of *Winter v. Payne*, 6 T. R. 645., where it had been held, that the attending and taking instructions to commence an action, drawing and engrossing an affidavit of debt, and attending to get the party sworn, &c. were items within the statute. *Collins v. Nicholson*, 2 Taunt. 321., where the same was held with respect to a bill for obtaining a bankrupt's certificate. *Ex parte Prickett*, 1 N. R. 266., where it was held that a charge for a *dedimus potestatem* in an attorney's bill, was sufficient to render the whole bill taxable, although with that exception the whole was for conveyancing. And the case of *Sandom v. Bourn*, 4 Campb. 68., where the same was held, where the charge was for preparing a warrant of attorney. In all these cases, the courts had shewn an anxiety to construe this beneficial statute liberally.

1819.
BURTON
v.
CHATTER-
TON.

On the other side, it was contended, that unless something was done in court in respect of which an item was charged, the case was not within the statute. In *Winter v. Payne* (a), the ground on which the Court had proceeded was, that the affidavit was sworn in court, and a fee had been paid to the officer of the court. In *Collins v. Nicholson*, the case depended on the st. 5 Geo. 2., and the allowance of the certificate must be under the Great Seal, and before the allowance it was

(a) 6 T. R. 645.

1819.

BURTON
v.
CHATTER-
TON.

necessary that an affidavit should be made in court. So the *dedimus potestatem* was upon a writ actually sued out in a real action. On the same principle, the levying a fine as auxiliary to a conveyance, was a proceeding in court. But there was no case (it was contended) where mere preparatory steps, independent of any affidavit made, or any actual proceeding in court, had been held to be within the statute. In the case of *Sandom v. Bourn*, it did not appear whether the warrant of attorney had been actually executed or not. The mere preparation of the bond and affidavit could not be considered as a proceeding either in a court of law or a court of equity; the stat. 5 Geo. 2. c. 30. had regulated the proceeding with respect to such costs. A commission of bankrupt could not be considered^{as} as issuing from the Court of Chancery, and could not be so alleged in an indictment. There was no officer to tax such costs.

ABBOTT Ld. C. J. was of opinion that the objection was a valid one. The Courts had put a liberal construction upon the statute, and in conformity with their decisions he was bound to do the same. The preparing an affidavit with a view to the suing out a commission was as much a part of the proceeding as the offering a petition for the same purpose.

The plaintiff was nonsuited. But by consent, leave was given to the plaintiff to move to set
aside

aside the nonsuit; and enter a verdict for the plaintiff for 5*l*.

Marryatt and Chitty for the plaintiff.

Gurney and Platt for the defendant.

1819.

BURTON

v.

CHATTER-
TON.

CONOLLY v. BAXTER.

Thursday,
Dec. 2.

THIS was an action of special assumpsit. In the first count of the declaration, it was alleged that the plaintiff, being lawfully possessed of the residue of a term of ninety-nine years, of which eighty-nine were unexpired, of certain premises therein specified, in consideration that the plaintiff, at the request of the defendant, would give up all his right and interest to the defendant of and in 150 feet of ground fronting *Tavistock Square*, the defendant undertook to fulfil, perform, and keep the terms and conditions in the memorandum-book kept at the Duke of *Bedford's* office for that purpose, in the way that was usual by persons taking ground there for building, and according to the rules of the said office, and also well and sufficiently to secure the said plaintiff, his executors, administrators, and assigns, for the whole building term in the said ground, an improved yearly ground rent of 40*l*. over and above the original ground rent of 42*l*. payable to the Duke of *Bedford*, with such covenants and con-

A. agrees to purchase *B's.* equitable interest in lands for a term of years at a specified rent, *A.* after paying the rent for several years and acknowledging that a further sum is due, cannot resist *B's.* claim for such further rent in an action at law, by shewing that he has not been able to use the lands. — Qu. Whether *B.* could recover for use and occupation.

1819.

CONOLLY

v.

BAXTER.

ditions for securing the same, clear of all deductions, as were contained in the leases of the Duke of *Bedford*. And that the plaintiff did afterwards, to wit, on, &c. give up the possession of the said 150 feet of ground to the defendant, and that the defendant had since remained in possession, and that the plaintiff had always been willing, and still was willing, to assign to the defendant the said 150 feet of ground for the remainder of the term. Breach, that the defendant had not secured to the plaintiff the improved yearly ground rent of 40*l.*, and had not paid the same. There was also a count for use and occupation.

It appeared that the defendant had for several years paid the rent of 40*l.* reserved to the plaintiff, and the action was brought to recover arrears unpaid. A letter written by the defendant to the plaintiff's solicitor was given in evidence, in which the defendant admitted that arrears were due, and promised payment on a particular day. The plaintiff also gave in evidence a written agreement between the defendant and himself, which corresponded exactly with the allegations contained in the first count of the declaration.

Marryatt, for the defendant, objected, in the first place, that the written agreement could not be read in evidence, because it was stamped with an agreement stamp only, and was not stamped as a lease. He also objected, that it did *not* appear that the defendant had been in possession of the premises ;

premises ; and objected, that the plaintiff could not recover for the use and occupation of the premises. The plaintiff had parted with the whole of his interest in the premises, and was entitled at most to a mere rent, he having no reversionary interest in the property, and therefore was not entitled to recover for the use and occupation of the land ; but,

1819.

CONOLLY
v.
BAXTER.

ABBOTT Ld. C. J. was of opinion, that the first count of the declaration had been sufficiently proved. He observed also, that there were many instances in which a defendant was liable for use and occupation, although he had no actual occupation of them, but where he might, if he had chosen, have occupied them, as where a tenant locks up the premises and goes away.

Marryatt on the part of the defendant, then proposed to show, that a contract for taking a lease of the premises under the duke had been originally made by a person of the name of *Scrimshaw*, and that the plaintiff had entered into some contract with *Scrimshaw*, by which he had engaged to stand in his situation. That the duke's agents were anxious that the plaintiff should enter into such engagements with them as would make him personally liable for the performance of *Scrimshaw's* contract, which the plaintiff had declined to do, and had never entered into any engagement with the duke, and that in consequence the agents of the duke had refused to let the defendant into

N N 1

posses.

1819.
 CONOLLY
 v.
 BAXTER.

possession, and he had never had any use of the land; but

ABBOTT Ld. C. J. was of opinion, that the remedy of the defendant was in equity, and that after the acknowledgments which he had made, and after paying the rent for so long, he could not resist the present action.

Verdict for the plaintiff.

Gaselee and Goulburn for the plaintiff.

Marryatt and Chitty for the defendant.

Thursday,
 Dec. 8.

GILLIES v. SMITHER, Administrator.

Under the plea of *plene administravit* to an action of *assumpsit*, an administrator may prove the expences of administration, and show that he has retained money to that amount. In order to prove payment of the intestate's debts upon

THIS action was brought to recover the sum of eighteen guineas upon a baker's bill. The defendant had pleaded, 1st, *non assumpsit*; and, 2dly, *plene administravit*. The debt was proved, and the only question was upon the second issue on the plea of *plene administravit*.

The plaintiff gave in evidence an inventory exhibited by the defendant in the Ecclesiastical Court, from which it appeared that he had received assets to the amount of 1083*l.* 14*s.* 11*d.*; and stated payments in discharge to the amount of

bond, which bonds are stated to have been burnt on payment of the debt, the existence of the bonds must be proved by means of the attesting witnesses.

1040*l.*

1040*l.* 14*s.* 11*d.*, leaving a balance of 43*l.* The exhibition also stated, that the intestate died possessed of furniture, &c. to the amount of 61*l.* 7*s.* 6*d.*, which had been delivered, according to the order of *Maria Mortimer*, in payment of a debt due to her upon bonds granted by the intestate. It also appeared that the proctor's bill for taking out letters of administration, &c. amounted to 46*l.* and upwards; but that this bill had not been proved at the time when the action was commenced.

1819.
GILLIES
v.
SMITHER.

It was contended, on the part of the plaintiff, that this ought to have been pleaded as an outstanding debt; and that, as it appeared on the face of the inventory that the defendant had assets in his hands to an amount exceeding the present demand, he was entitled to recover. But

ABBOTT Ld. C. J. was, after observing on the state of the pleadings, of opinion that the defendant, under the plea of *plene administravit*, might show that he had retained money in his hands to pay for the expences of administration, to which he had made himself liable. He might, under that plea, have retained to the amount of a debt due to himself; and it seemed to be reasonable that he should also retain to the amount of the expences of administering for which he had made himself personally responsible.

It was further proposed, to prove, on the part of the defendant, that the intestate had died indebted to his mother, *Maria Mortimer*, upon bonds executed by him to the amount of 1600*l.* and upwards,

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GILLIES

v.

SMITHER.

wards, and that his estate was then insolvent ; but that *Maria Mortimer* had agreed to forego her claim upon the property, provided the other creditors, who (as it appeared) were all simple contract creditors, would agree to take 5s. in the pound in satisfaction of their respective debts, and leave from one to two hundred pounds to the widow of the intestate, and also the furniture of the intestate ; that all the creditors, with the exception of the plaintiff, who was not then known to be a creditor, had acceded to this arrangement, and that the furniture had accordingly been given to the widow ; that upon the making of this arrangement, the bonds in question had been burnt ; that the estate being insolvent, the widow had declined to take out administration ; and that the defendant, being a creditor, had administered at the request of the other creditors.

A witness having been called to prove the destruction of the bonds, it was objected, on the part of the plaintiff, that it was necessary to prove their execution by calling the subscribing witnesses.

It was answered, that in the present instance this was unnecessary, the documents having been destroyed.

ABBOTT Ld. C. J. The difficulty appears to me to be insuperable, considering the mode of pleading which has been adopted : the evidence of the attesting witnesses is essential to show that the bonds ever existed. I will not, however, prevent you from going on with your evidence.

His Lordship afterwards stated to the jury, that he had seldom regretted more that parties had not adopted such a mode of proceeding as would have given them the legal benefit of their intention. Nothing could be more honourable than the intention of the parties in the present instance. It was unfortunate that they had not sold the property and distributed it as they intended, and that the bonds had not been cancelled by tearing off the seals, without destroying them entirely. The Court and jury, however, were bound to decide upon the evidence before them; and upon that evidence, it appeared to him that the plaintiff was entitled to their verdict.

1819.
GILLIES
v.
SMITHER.

Verdict for the plaintiff.

Scarlett and Jones for the plaintiff.

Gurney for the defendant.

ADAMS v. GREGG.

Thursday,
Dec. 2.

ASSUMPSIT upon a bill of exchange dated November 6th, 1817, drawn by *Samuel Holmes* upon the defendant, for the payment of 50*l.* six

A bill accepted for the accommodation of the drawer becoming due,

A. B., expecting to have funds in his hands belonging to the son of the drawer, takes up the bill, in order to prevent proceedings against the drawer, on condition that he shall be allowed to stand in the place of the holder (the indorsee, from the drawer), and sue in his name. This does not discharge the acceptor from an action afterwards brought by *A. B.* in the name of the indorsee, even although *A. B.* has declared that he would not trouble the acceptor.

weeks

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ADAMS

v.

GREGG.

weeks after date, to the order of the drawer, and indorsed by him to the plaintiff.

It appeared on the evidence for the defendant, that the plaintiff, who was a creditor of the drawer to the amount of the bill, knew that the bill had been accepted for the accommodation of the drawer; that the bill had been taken up by one *Jones*, who had indemnified the plaintiff for bringing the action in his name; that *Samuel Holmes*, a son of the drawer, when the bill became due, and when the plaintiff was about to proceed upon it, being entitled to receive a sum of money from *Jones*, who had purchased some ground-rents from him as the agent of one *Daed*, had sent a written request to *Jones* to take up the bill; that *Jones* did take up the bill, and that the words "Received the contents of the within bill to prevent proceedings" were then written on the back of the bill. It also appeared, on the cross-examination of a witness called for the plaintiff, that the bill had been taken up by *Jones*, on condition that he should, if it became necessary, stand in the situation of *Adams* the plaintiff. Evidence was also given that when *Jones* had been applied to on the behalf of the defendant, the acceptor, to give up the bill, that he said he should not be troubled about it. It was contended, on the part of the defendant, that this was sufficient to discharge him from the present claim, since he was merely a surety for the drawer. But

ABBOTT Ld. C. J. was of opinion that this was insufficient, in point of law, to discharge the acceptor. If a party disabled himself from suing the prin-

principal, it was a rule both of law and equity that he thereby discharged the principal. If he had disabled himself from suing *Holmes*, who was to be considered as the principal, the present action could not have been supported against the surety; but there was no point of time when he was so disabled. The son of the drawer supposed that *Jones* would pay the bill; and *Jones*, to prevent the drawer from being arrested, and expecting that he should afterwards be able to reimburse himself out of the money which was to come into his hands, paid the amount of the bill; but he did it on the condition that he might use the plaintiff's name to sue upon the bill, in case it should become necessary. His Lordship added, on the point being urged, that he thought that the declaration made by *Jones*, that the defendant should not be troubled, was not sufficient, in point of law, to discharge him.

1819.

ADAMS

v.

GREGG.

The defence would not be available, unless the defendant could show that the payment had been unconditional.

The defendant having failed in his attempt to prove this, the plaintiff had a verdict. (a)

Scarlett and Manning for the plaintiff.

Pollock for the defendant.

(a) See the cases of *Walpole v. Pulteney*, cited *Doug.* 236. *Whately v. Tricker*, 1 *Camp.* 35. *Black v. Peele*, *Doug.* 236. *Mason v. Hunt*, *ib.* *Dingwall v. Dunster*, *Doug.* 235. 247. In the case of *Black v. Peele*, the attorney of the plaintiff, finding that the bill had been accepted for the accommodation of the drawer, sent word to the acceptor that he had settled with *Dallas* the drawer, and that he the acceptor need give himself no further trouble; but, in that case, the attorney also took a new security from *Dallas* the principal.

1819.

Friday,
Dec. 3.

COVENTRY v. STONE.

A., by the direction of *B.*, builds a wall upon the land of *C.* *C.* cannot support an action on the case against *B.* for the continuance of this wall. *Semble*, if *A.* building a house on his own land, encroach upon the adjoining land of *C.* and dispose of his interest in the house to *B.*, *C.* cannot maintain an action on the case against *B.* for the continuance of the wall.

THE plaintiff declared, in an action of trespass on the case, that the defendant had wrongfully and injuriously erected a wall upon the plaintiff's land. The declaration contained a second count, alleging that the defendant had continued a wall on the plaintiff's land already erected.

On the part of the plaintiff it was stated, that the plaintiff had taken a plot of land of the breadth of 30 feet, part of a larger plot of 45 feet, and that a person of the name of *Hunt* had taken the remaining 15 feet; that the plaintiff had instructed *Hunt*, who was about to build on his own plot, to build a cottage for the plaintiff on his land, and that *Hunt* had extended his own building 20 inches into the plaintiff's land; that *Hunt* had afterwards disposed of his interest to the defendant, who, upon being applied to to pull down the wall, refused to do so, alleging that he had a right to have it as he had purchased it from *Hunt*. After this case had been opened,

ABBOTT Ld. C. J. called upon the counsel for the plaintiff to show him what authority there was for bringing such an action against a person for continuing an erection which the plaintiff had allowed to be made.

It was then stated, that the original erection had been made by *Hunt* under the direction of *Stone*.

ABBOTT

ABBOTT Ld. C. J. Then it was a trespass on the part of *Stone*, and you cannot maintain an action on the case for the continuance of the trespass by the same person.

1819.
COVENTRY
v.
STONE.

Plaintiff nonsuited.

Gurney and *Comyn* for the plaintiff.

Scarlett for the defendant.

DOE, on the Demise of the Earl of RADNOR, v.
TAYLOR and Others.

Friday,
Dec. 3.

EJECTMENT to recover certain premises situate in the parish of *St. Andrew, Holborn*.

The Earl of *Radnor* had made an agreement with one *Pearse* to let the land in question to him, and to grant him a lease of it, provided he pulled down the old building and erected a new house upon the site on or before the 1st day of *July*, 1818. *Pearse* had assigned his interest to *Hammond*, who had become bankrupt, and the present defendants were his assignees.

To show their possession, it was proved that a demand of possession had been served upon them, and that they answered that it was not consistent with their duty as assignees to deliver up the possession.

Ejectment against the assignees of a bankrupt: proof, that upon being required to give up possession of the premises, they answered that it was not consistent with their duty to do so, is sufficient proof of possession.

ABBOTT Ld. C. J. was of opinion that this was sufficient proof of their possession.

1819.

Friday,
Dec. 3.

REX v. HOLLIS.

Where an indictment for disobeying an order of justices, appears to be founded on an order made in a case in which the justices had no jurisdiction, the Court will direct an acquittal at the sittings, although the defect appears on the record.

THIS was an indictment against the defendant for not having removed an encroachment made by extending his house in *Goswell-street*, in pursuance of an order made by two justices of the peace under the building act, confirmed by the Court of Quarter Sessions, upon an appeal by the defendant against the order.

After the indictment had been read, *Bolland*, for the defendant, submitted to the Court that no indictable offence was alleged on the face of the indictment, and urged that this was the proper time for making such an objection, for which he referred to a case before Lord *Ellenboroug*, who said that it was proper to make such an objection in *limine*; and he was prepared, he said, to show that the conviction before the two justices was void, and that, if so, no judgment could be supported upon a vitious record.

ABBOTT Ld. C. J. said, that it appeared that the defendant was charged with having disobeyed an order of two magistrates, and that he thought the objection was premature, in the present stage of the business.

The counsel for the prosecution then gave, in evidence, the petition of the defendant to the Court of Quarter Sessions to receive his appeal. This petition recited the information and conviction

tion before the two magistrates. Both the information and adjudication charged the defendant with having unlawfully made an addition to a house of the third-rate or class of buildings, projecting three feet six inches beyond the upright line of the said building. The adjudication of the justices alleged that this was a common nuisance; and, further, directed that the same should be abated on or before the 12th of *January* then next.

1819.

REX

v.

HOLLIS.

Bolland, for the defendant, objected that no offence against the building act, 14 G. 3. c. 78. s. 40. 60. was charged in the conviction, and consequently that no indictment could be supported for disobedience of an order which was utterly void.

The building act, s. 49. enacted, that no bow-window or other projection should be built or added to any first, second, third, or fourth-rate building next to any public street, &c., so as to extend beyond the general *line of the fronts of the houses*, except such projections as may be necessary for copings, cornices, &c.

Gurney and *Andrews*, for the prosecution, answered that the order of sessions was grounded upon the act of the defendant, as set forth in his own petition; and that by the 78th section of the building act it was enacted, that the judgment and determination of the justices at sessions should be binding on the party. It was also urged, that as the objection appeared upon the record, the pro-

1819.

REX

v.

HOLLIS.

per way of objecting would be by motion in arrest of judgment.

ABBOTT Ld. C. J. The order would be binding and conclusive in a case where the justices had jurisdiction over the subject matter; but where they have not, they cannot make an order binding upon any one. The subject matter of the order is not within the act of parliament.

The defendant was accordingly acquitted.

Gurney and *Andrews* for the prosecution.

Bolland for the defendant.

Friday,
Dec. 3.

WELD v. CRAWFORD.

If one item of an attorney's bill be for preparing a warrant of attorney to confess a judgment, a bill must be delivered according to the stat. 2 G. 2. c. 23. s. 23., although the warrant has not been executed.

THIS was an action upon an attorney's bill: the items consisted chiefly of charges for business done in negotiating an annuity, but one item was for drawing and preparing a warrant of attorney to confess a judgment. This, however, had not been executed. A copy of the bill had been delivered one month previous to the commencement of the action, but it had not been signed by the attorney according to the provisions of the stat. 2 G. 2. c. 23. s. 23.

On the part of the defendant it was objected that this item rendered the whole of the bill taxable and the usual notice necessary.

Scarlett,

Scarlett, for the plaintiff, submitted, that the only effect which the omission ought to have was, that the item should be struck out. But

1819.
WELD
v.
CRAWFORD.

ABBOTT Ld. C. J., referring to the former decisions upon the subject, acceded to the objection; and the plaintiff was

Nonsuited.

Scarlett and *Chitty* for the plaintiff

Marryatt and *Adams* for the defendant,

DELAUNEY v. BARKER.

Dec. 6.

THIS was an action of trover, brought by the plaintiff, a jeweller in *Bond-street*, against the defendant, who was a pawn-broker, to recover the value of jewellery to a large amount.

Goods are delivered to a bailee on a contract of sale and return, the bailee has no authority to pledge the goods.

It appeared on the evidence of the plaintiff's shopman that on the 12th of *April* 1819, a person of the name of *Tupman*, with whom the plaintiff had been formerly in the habit of dealing, came to the plaintiff's shop and requested to have the jewellery in question, saying that one *Bander* would purchase several articles as a present for a lady who was about to be married. That the articles in question were delivered to *Tupman* for this purpose, under a special agreement that those which were not purchased by *Bander* should be

Application of the stat. 21 J. I. c. 19. s. 10. to such a case.

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returned to the plaintiff within the space of two hours, and that *Tupman* should receive a compensation for his trouble, of 10 *per cent.* upon the articles purchased ; a prospect was also held out of some further advantage.

It also appeared that *Tupman* pawned the whole of this property at the defendant's the next morning upon receiving an advance of 60%. That the plaintiff had sent the next morning to inquire after *Tupman*, and afterwards, about the latter end of *April*, in consequence of a communication on the subject from *Tupman*, had applied to the defendant to deliver up the goods, who had refused to do so, alleging that *Tupman* had become a bankrupt, and that he was liable to a claim by his assignees. It appeared also that the plaintiff had, in many instances, dealt with *Tupman*, but to a much less amount, in supplying him with goods upon sale and return ; and upon the examination of *Tupman* himself it appeared to be doubtful whether the goods in question had not been so supplied ; that is, upon a contract that such of the goods as *Tupman* did not either sell or elect to keep upon his own account should be returned to the plaintiff *Tupman*, having an option whether he would return them or not.

Scarlett, for the defendant, stated that he should be able to shew that the goods were delivered upon a contract of this nature : and submitted that if he should be able to substantiate the fact in evidence, the plaintiff would not be entitled to recover,

recover, since *Tupman* had an option to exercise, whether he would return the goods or not, and not having returned them, was to be considered a purchaser. But

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ABBOTT Ld. C. J. was of opinion that this would be no defence. Cases of this kind had come before the Court very frequently; the party taking goods upon such conditions did not purchase the goods out and out in the first instance, if he did so, then he would become liable to pay for the whole amount, and could not afterwards return them, which would be contrary to the nature of the contract. He had an option either to return the goods or to keep them; if he elected to keep them, he was to announce that intention to the proprietor; and then, and not till then, he would become the purchaser.

It was then urged, on the part of the defendant, that the plaintiff had so far constituted *Tupman* as his agent that the latter had authority to pledge the goods. But

ABBOTT Ld. C. J. said that there was not the least pretence for this objection; his authority was to sell and not to pledge. (a)

It was afterwards proved, on the part of the defendant, that *Tupman* had become a bankrupt under a commission, dated on the 23d of the same

(a) See *Graham v. Dyster*, *supra*.

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month of *April* ; and it was contended that, under these circumstances, the property in the jewellery in question had vested in the assignees under the commission, as having been in his possession, order, and disposition, within the stat. 21 J. 1. c. 19. s. 11.

ABBOTT Ld. C. J. permitted the defendant to go into evidence of the bankruptcy in order to save the parties the expence of coming to trial again, in case the Court should be of opinion that the statute of *James 1.* applied to the present circumstances. But he intimated that his own opinion was that the case was not within the statute. (a)

The question was afterwards left to the jury, whether the goods had been delivered upon the special contract, as stated by the plaintiff's shopman, or upon a general contract of sale and return. The jury found that it was a special delivery.

Verdict for the Plaintiff.

Marryatt and *Cottingham* for the plaintiff.

Scarlett and *Wylde* for the defendant.

(a) See *Ex parte Gibson*, 3 P. Wms. 187, n. *Cullen's Bank*, L. 225.

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— v. ARMSTRONG AND OTHERS.

Dec. 7.

THIS was an action of trespass brought to try the question, whether the plaintiff was liable to be rated to the poor's rate in respect of his occupation of a house.

The house in question, was occupied by the plaintiff under the trustees of the navigation of the river *Lee*, having been appointed their surveyor; and it was situate on the river *Lee* about half way between *London* and *Hertford*. It had been built out of the tolls arising from the navigation of the river, and the plaintiff occupied it for the purpose of superintending the business of the trustees. By the provisions of the act of parliament which regulated the tolls to be taken on this river, it was expressly directed that the tolls arising from the navigation should not be subject to the poor's rates. It was contended that as the plaintiff was the servant of the trustees, who had no beneficial interest in the navigation of the river or in the tolls, he was to be considered as the servant of the public, and as exempted from the poor's rate, if the trustees had not built the house they must have paid for one out of the rates and duties collected on the river.

One who occupies a house as surveyor to the navigation of the river *Lee*, under the trustees of that river, held to be liable for poor's rates, although by act of parliament the tolls, &c. are exempted from being rated, and although the trustees have no beneficial interest, but act for the public.

ABBOTT Ld. C. J. was of opinion, that the plaintiff was rateable in respect of this house. If he had received a salary out of the tolls, and had

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rented another house, he would clearly have been liable to be rated for it.

v.

ARM-
STRONG.

Verdict for the defendants.

Gurney and Walford for the plaintiff.

Marryatt and Gaselee for the defendants.

Dec. 7.

LETHBRIDGE v. PHILLIPS, Knt.

A. lends a picture to *B.*, who wishes to shew it to *C.* *B.*, without any previous communication with *C.*, and without his knowledge, sends the picture to his house, where it is accidentally injured: *C.* is not responsible in *assumpsit* for not keeping the picture safely.

Semble, whether *B.* is a competent witness for the Plaintiff.

ACTION of special *assumpsit* to recover damages for an injury done to a miniature painting of the plaintiff's.

The declaration alleged, that in consideration that the plaintiff would entrust the miniature in question to the defendant, the latter undertook, &c. to keep it safely, and to return it safe into the hands of the plaintiff.

The plaintiff, Mr. *Lethbridge*, who was very eminent as a portrait painter in miniature had taken a likeness of Mr. *Wolcot* (known by the name of *Peter Pindar*) shortly before his death. A person of the name of *Bernard* being desirous, for particular reasons of his own, that the defendant should see this picture, borrowed it of the plaintiff for the purpose of sending it to the defendant, and afterwards delivered it to a son of the defendant's to be taken to the defendant's house. The defendant's son accordingly took it home, and the miniature was, whilst at the defendant's,

fendant's, much damaged in consequence of having been placed on a mantle piece near a large stove. It appeared that the picture had been sent by *Bernard* to the defendant without any request on the part of the latter, and without any previous communication between them on the subject.

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ABBOTT Ld. C. J. observing that the picture had been sent without the knowledge of the defendant, and without any previous communication with him upon the subject, inquired whether there was any authority to shew that the circumstances were sufficient to raise a contract between the parties, and whether the plaintiff could by any evidence alter the case.

On the part of the plaintiff it was admitted that the case could not be altered, and

ABBOTT Ld. C. J. said, that he was of opinion that the action could not be supported. The defendant could not, without his knowledge and consent, be considered as a bailee of the property. In some instances it had happened that property of much greater value than that in the present case had been left at gentleman's houses by mistake, in such cases the parties could not be considered as bailees of the property without their consent

The plaintiff was accordingly

Nonsuited.

In the course of the cause, *Bernard*, being called as a witness for the plaintiff, demurred to being

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being examined, unless the plaintiff would execute a release to him according to a promise which he had made to that effect. The plaintiff, by his counsel, admitted that such a promise had been made in order to procure the attendance of the witness, who had refused to obey the *subpoena* with which he had been served, but declined to execute a release.

The counsel for the defendant then objected to the competency of the witness who, since he was the medium through which the picture was conveyed to the defendant, would, if the defendant was not responsible for the damage, be himself liable, and was therefore interested in procuring a verdict to be given for the plaintiff. In the ordinary case of an action for negligence, the servant or agent guilty of the negligence, was not a competent witness without a release. If an action were to be brought against an executor, a legatee would not be a competent witness. [*Abbott* Ld. C. J. But the judgment would afterwards be evidence against the legatee.] That if there were two owners of different mills on the same stream, and one of them brought an action against the other for penning up the water, the other proprietor would not be a competent witness, although the verdict would not be evidence for him. That although it had been held, that a co-trespasser, not included as a party in the action, was a competent witness for the plaintiff, although a judgment against the defendants would discharge himself, yet
 9
 that

that the learned judge who had so ruled afterwards thought that he had done wrong in admitting the evidence.

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Marryatt, for the plaintiff, contended, that if the evidence was inadmissible, the rule might have the effect of excluding all evidence, where there were two wrong doers, since neither of them could be a witness for the other.

ABBOTT Ld. C. J. held, that the witness was competent; the judgment would not be evidence for him, and he was not immediately interested in the result. His Lordship said, that he recollected an instance, where the plaintiff had released a co-trespasser who was not a party to the action, upon which the defendants put in a plea *puis darrein continuance* founded on the release.

Marryatt and Chitty for the plaintiff.

Scarlett for the defendant.

See *Chapman v. Greaves and Others*, 2 Campb. 333. n.

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DE BERENGER v. WHEBLE.

Where an engraving has been made from a picture it is not a piracy of the print for another artist to make another engraving from the original picture.

THIS was an action on the stat. 8 G. 2. c. 13. and 17 G. 3. c. 57. for infringing the plaintiff's copyright in two prints, which he had engraved from two pictures by Mr. Reinagle.

It appeared that the plaintiff had purchased from Mr. Reinagle the privilege of engraving the prints, on the alleged piracy of which the action was founded, from two pictures which had been painted for Mr. Reinagle's own use, and of which he remained the proprietor. — The plaintiff had employed an artist of the name of Thompson to execute the engravings. Thompson having the pictures in his possession for this purpose, after he had completed the two engravings for the plaintiff, made two sketches for his own study, and these sketches were taken from the original pictures, and had not been in any part copied from the plaintiff's engravings. From these sketches he made two prints for the defendant, who published them in the Sporting Magazine, and for this alleged piracy the action was brought.

On the part of the defendant it was contended, that the stat. 17 G. 3. c. 57. did not give any monopoly in the picture to the engraver, but left the use of it still free and unrestrained to the painter

painter who might make as many copies of it as he thought fit.

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ABBOTT Ld. C. J. It would destroy all competition in the art to extend the monopoly to the painting itself. The words of the statute are, "if any engraver, etcher, print-seller or other person, shall engrave, etch, or work or cause to be engraved, &c. any copy of any print which shall be engraved, etched, &c." but in this case, the defendant's engraving was made from the original picture, and not from the plaintiff's print.

Plaintiff nonsuited.

Scarlett and Adolphus for the plaintiff.

Holt and Tindal for the defendant.

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IN THE KING'S BENCH,

After Michaelmas Term,

60 GEORGE III.

ADJOURNED SITTINGS AT GUILDHALL.

BENNETT and Another v. HENDERSON.

Proof that the Plaintiff sent goods to the Defendant, resident in a foreign country, upon the order of merchants residing in London, and that the Defendant received and used the goods, is *prima facie* evidence of goods sold and delivered to the Defendant.

THIS was an action brought to recover the price of a curricule sold to the defendant.

The plaintiffs were coachmakers in *London*, and the curricule in question had been ordered by *William Henderson* and Co., merchants in *London*. The plaintiffs proved that the curricule had been sent by the plaintiffs, directed to the defendant, Major *Henderson*, who was serving as an officer in the artillery at *Quebec*, by the ship *Vigilante*, and evidence was also given, to shew that the defendant had received the curricule.

It appeared, that *William Henderson* and Co. were general merchants, and that they had funds in their hands, of the defendant, at the time when the curricule was ordered, and that they had since become bankrupts.

Scarlett,

Scarlett, for the defendant, objected, that this was insufficient evidence, the plaintiffs having proved no order by the defendant for the goods, the presumption was, that the credit had been given to *Henderson* and Co., and not to the defendant, who was in a foreign country.

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HENDER-
SON.

ABBOTT Ld. C. J. was of opinion, that there was evidence to go to a jury, although, certainly, it was very slight. It appeared, however, that the curricie had been sent by the plaintiffs to the defendant, and had been received by him.

The defendant then went into evidence to shew, that the credit had been given by the plaintiff's to *Henderson* and Co., and that an invoice had been made out and sent to them, that they had sent the curricie to the defendant, and had shipped the goods, and had paid the shipping charges. The jury found a

Verdict for the defendant.

Gurney and *Campbell* for the plaintiff.

Scarlett and *Walford* for the defendant.

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CULLEN and Another v. MAC ALPINE.

As against the master of a vessel in an action for not safely conveying goods to a foreign port consigned to the plaintiffs, evidence that the goods were seized in another foreign port by the government coupled with a letter of the defendant's, in which he acknowledges that he is accountable for the goods, is sufficient to warrant the jury in finding for the plaintiffs, without any further proof of the cause of seizure. — Variance.

THIS was an action of special *assumpsit* against the defendant, as the master and commander of the ship, for not safely conveying to and delivering at *Oratavia* 20 puncheons of brandy and a barrel of glue.

The first count of the declaration alleged that the defendant, being the master or commander of the *Wooten*, in the river *Thames*, then bound to the port of *Oratava*, in the island of *Teneriffe*, the plaintiffs, at the special instance and request of the defendant, caused to be shipped on board of the said ship or vessel divers goods and merchandises; to wit, 20 puncheons of brandy and one barrel of glue, to be taken care of and safely and securely carried and conveyed by the said defendant, as such master and commander as aforesaid, in and on board of the said ship or vessel, from the river *Thames* aforesaid to the port of *Oratava* aforesaid, and there, to wit, at *Oratava* aforesaid, to be safely and securely delivered in the like good order and well conditioned *for the said plaintiffs*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever, save risk of boats, so far as ships are liable thereto, excepted; and that in consideration thereof the defendant undertook, &c. And it was afterwards

wards alleged, by way of breach, that the defendant did not nor would take care of, and safely and securely carry and convey the said goods and merchandises, so shipped in and on board of the said ship or vessel as aforesaid, from *London* aforesaid to *Oratava* aforesaid, and there, to wit, at *Oratava* aforesaid, safely or securely deliver the same to the said plaintiffs, although neither the act of God, nor the king's enemies, nor fire, nor any other danger nor accident of the seas, rivers, or navigation, prevented him from so doing; but on the contrary thereof, he, the said defendant, so being such master of the said ship or vessel as aforesaid, so carelessly and negligently behaved and conducted himself, &c. that the said goods and merchandises, and every part thereof, became and were wholly lost to the said plaintiffs. The second count alleged the breach in a similar manner, in not delivering to the plaintiffs.

The goods in question had been shipped on board the *Wootten*, of which the defendant was master, by Messrs. *Rocher, Casanos* and Co. on the account of the plaintiffs, who were merchants resident in *Teneriffe*.

In the bill of lading it was expressed, that the goods were to be shipped in the *Wootten*, then riding at anchor in the river *Thames*, and bound for the port of *Oratava* in *Teneriffe*, to be delivered in the like good order and well conditioned at the aforesaid port of *Oratava*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation

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of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted, unto Messrs. *Joseph Cullen* and Co. or their assigns, &c.

The vessel, instead of proceeding directly to the port of *Oratava*, put into the harbour of *Santa Cruz*, where the cargo was seized by order of government; and the plaintiffs having detained the ship on account of the non-delivery of the brandy, the defendant, in order to obtain the discharge of the ship, wrote a letter to them, in which he stated that the ship itself was of diminutive value, and that he held himself accountable to the shippers of goods, agreeable to the tenor of the bills of lading.

Gaselee, for the defendant, objected, in the first instance, that there was a variance between the bill of lading and the declaration, and between the undertaking as laid in the first two counts and the breach assigned, the undertaking being laid to deliver for the plaintiffs at the island of *Oratava*, the breach being that the defendant did not deliver to the plaintiffs. But

ABBOTT Ld. C. J. said that he would not nonsuit the plaintiffs upon this objection.

It was then objected that the plaintiffs had not shewn that the loss had been occasioned by any misconduct on the part of the defendant; it was possible, consistently with the evidence as it stood, that the goods might have been detained by the govern-

government for non-payment of the duties by the plaintiffs themselves, and therefore some evidence was requisite in order to negative this, and to shew that the loss had been occasioned by the default of the defendant.

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ABBOTT Ld. C. J. was of opinion that the letter in which the defendant acknowledged himself to be accountable for the goods, was evidence against him to go to the jury.

Afterwards the plaintiffs had a verdict.

Scarlett and *Denman* for the plaintiffs.

Gaselee and *Tindal* for the defendant.

ROBEY v. HOWARD.

Tuesday,
Dec. 21.

THE declaration alleged that the plaintiff had, at the request of the defendant, paid into his hands the sum of 315*l.*, to be vested in the purchase of an annuity, and that the defendant undertook to lay the money out upon a valid security, and alleged as a breach, that the defendant had laid out the money upon an insufficient security. The defendant had pleaded, in abatement, that the promises had been made jointly, by himself and one *George Diggles*. The replication denied that the promise had been made jointly.

Upon a plea in abatement for non-joinder of another, as defendant in assumpsit, the counsel for the plaintiff is to begin. — Evidence to sustain the plea.

P P 2

After

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After the pleadings had been opened, it was made a question, whether the counsel for the plaintiff or for the defendant ought to begin.

ABBOTT Ld. C. J. was of opinion, that the counsel for the plaintiff ought to begin, since, at all events, it was incumbent on the plaintiff to prove his damages.

It appeared, that the defendant was a money-scrivener, engaged largely in transacting negotiations for the purchase of annuities ; the principal evidence on the part of the plaintiff consisted, in producing a pass-book between the plaintiff and defendant, in which, on the debit side, the defendant described the plaintiff as debtor to *Howard* (the defendant) alone ; and in which book also, he gave the plaintiff credit for the 315*l.* in his own name. It was also proved, that similar books had been kept between the defendant, and several other persons. It appeared, also, that the account had been kept with the banker in *Howard's* name alone, and not in the joint names of *Howard* and *Diggles*. On the other side, much evidence was adduced, in order to shew that, at the time when the money was advanced, viz. in 1808, *Diggles* was a co-partner with the defendant. It also appeared, that the joint names of *Howard* and *Diggles* were then inscribed on a brass plate on the door of their office of business, and that they had effected insurances and caused enrolments to be made, and done other business in their joint names.

On

On the part of the plaintiff it was insisted, that although a partnership might subsist at the time between the defendant and *Diggles*, yet, that in the present instance, the plaintiff contracted with the defendant solely, and that the pass-book was strong evidence to prove this.

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ABBOTT Ld. C. J., in summing up to the jury, informed them, that the question for their consideration was, whether the plaintiff, at the time when he paid the money, paid it to *Howard* and *Diggles* jointly, trusting to their joint responsibility, or he paid it to *Diggles* alone, relying on his sole responsibility. The pass-book was a very important document, since it appeared, from that book, as if the credit had been given to *Howard* alone, who made himself debtor for the 315*l.* which had been paid for the purchase of the annuity. That evidence, however, was capable of being rebutted by other evidence, tending to shew, that the credit had been given to *Diggles* as well as *Howard*. After commenting fully upon all the facts of the case, his Lordship added, that it was for the jury to consider, whether the plaintiff intended, at the time, to trust *Howard* alone, or to give credit to both *Howard* and *Diggles*. It was very possible, that the plaintiff might suppose that the two were partners for certain purposes, and to a particular extent, as in the preparing the deeds and negotiating annuities with the grantors, who, in such cases, usually paid the expences, and yet

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not suppose them partners with respect to the monies which he advanced.

The jury found for the plaintiff.

Scarlett, Marryatt, and R. Scarlett, for the plaintiff.

Gurney, Littledale, and Barnewall for the defendant.

PEACOCK v. MURRELL.

The value of the stamp upon a bill of exchange, under the statute 55 G. 3. c. 184. sched. tit. Bill of Exchange, depends upon the date upon the face of the bill.

THIS was an action by the plaintiff, as the indorsee of a bill of exchange, dated *January 14th, 1819*, drawn upon the defendant for the sum of 104*l.*, payable two months after date.

It appeared that the bill had been drawn after the 4th and before the 14th of *January*, and had first been dated on the 4th of that month, but that before the parties left town, and before the acceptance, the date had been altered, for the convenience of the drawer, from the 4th to the 14th. The bill bore a stamp to the amount of 4*s. 6d.*

Marryatt, for the defendant, objected that this was not the proper stamp. The stat. 55 G. 3. c. 184. had provided in the schedule that bills drawn at a date not exceeding two months should bear

bear a stamp of one specified value; but if the time exceeded two months' date the schedule required a stamp of a greater amount; that in the present instance the bill ought to have borne the larger stamp. But

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MURRELL.

ABRORT Ld. C. J. was of opinion that the date meant by the statute was the date on the face of the bill.

The plaintiff had a verdict.

Scarlett and Evans for the plaintiff.

Marryatt and Reader for the defendant.

SPALL v. MASSEY and Others.

Wednesday,
December 22.

ACTION on the case. The declaration alleged that the plaintiff was the occupier of a dwelling-house situate in *Cavendish Court*, and that he used, exercised, and carried on there the trade and business of a retailer of wines, and that the defendants intending to oppress, injure, and impoverish the plaintiff, and to cause it to be suspected and believed that he kept a house of ill-fame, and to subject him to the pains and penalties of the law for so doing, &c. set up, near to the door of his said dwelling-house, a board with the inscription upon it, "Beware of bad houses," &c.

In an action on the case for exhibiting an inscription opposite to the plaintiff's house, insinuating that it was a house of ill-fame, a prefatory allegation that the plaintiff carried on the business of a retailer of wines there, may be rejected as surplusage, there being no allegation that the publication was of and concerning the plaintiff as such retailer of wines.

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MASSEY.

The defendants pleaded the general issue, and also two special pleas of justification alleging that the plaintiff did keep a disorderly house, &c.

In order to prove the allegation that the plaintiff carried on the business of a retailer of wines, a licence from the excise office was produced, and proved to have been regularly signed, by which the plaintiff was authorised to deal in wines. On the part of the defendant it was objected, that this was not sufficient without shewing that the plaintiff had likewise taken out a licence to sell ale and beer, since the statute 39 G. 3. c. 59. s. 9. prohibited any person from selling wine by retail unless he had also a licence to sell ale and beer. And it was contended, that inasmuch as the allegation had not been proved, that the plaintiff must be nonsuited, since he could not be allowed to maintain an action for being prevented from doing that which was unlawful.

ABBOTT Ld. C. J. said that the policy of requiring a person who sold wine by retail to take out a licence for the sale of ale and beer was obvious, it was for the purpose of placing the retailer of wine under the superintendence and controul of the magistrates. But his Lordship was of opinion that as the inscription was not alleged to have been published concerning the plaintiff as a retailer of wine, the allegation that he was so might be considered as struck out of the declaration.

The

The defendants afterwards entered upon their defence, and having made out a strong case in support of their pleas in justification, the plaintiff elected to be nonsuited.

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v.
MASSEY

Scarlett and Reader, for the plaintiff.

Gurney and Knowlys C. S. for the defendant.

FLETCHER and Another v. BOWSHER and Others.

ACTION on the case. The first count of the declaration stated that, whereas before and at the time of committing of the grievances by the defendants hereinafter mentioned, the said defendants were possessed of a certain ship or vessel called the *Beaufort*, to wit, at, &c. that the said ship had not been built in the year 1816, of the best *English* oak. That the said ship before and at the time of the committing of the said grievances was old, rotten, ruinous, out of repair, unseaworthy, in great decay in her timbers, and infested with the dry rot, to wit, at, &c. as the said defendants before and at the time of committing the said grievances well knew. Yet that the said defendants contriving, and fraudulently intending craftily and subtly to deceive and injure the said plaintiffs in this respect, and to induce the said plaintiffs to purchase the said ship, at and for a large sum of money heretofore to wit, on, &c. at, &c. falsely, fraudulently, and deceitfully represented to the said

The vendor of a ship represents her to have been built in 1816, although in fact she had been launched a year earlier; the vendee is entitled to recover damages for the deceit, although the ship was to be taken with all faults.

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said plaintiffs that the said ship or vessel was built in the year 1816, of the best *English* oak, and that the said defendants contriving, &c. then and there placed the said ship in a certain situation wherein the decayed state and condition of the said ship or vessel could not be inspected or discovered by the said plaintiffs, and then and there put and laid a certain coat of pitch of great and extraordinary thickness on the bottom of the said ship or vessel, and then and there used and employed divers other subtle arts and devices for the purpose of concealing the decayed state and condition of the said ship or vessel from the said plaintiffs, and thereby the said defendants, afterwards, to wit, on, &c. at, &c. falsely induced the said plaintiffs to purchase the said ship with divers stores belonging thereto from the said plaintiffs, for a certain price or sum of money, to wit, the sum of 5800*l.* of lawful money, &c. and then and there falsely, fraudulently, and deceitfully sold the said ship or vessel, with the stores aforesaid, to the said plaintiffs, at and for the said sum of money, to wit, at, &c. by means whereof the said ship being then and there old, rotten, &c. became of little or no use to the said plaintiffs, and the said plaintiffs were then and there cheated and defrauded of the said sum of 5800*l.*, and also by means of the said premises, the said plaintiffs, believing the said ship to be sound and seaworthy, caused a certain cargo of goods to be loaded on board thereof, in order to be carried therein on a certain voyage, to wit, from *Cork* to the Island of *Jamaica*; and the said ship

ship being leaky and unseaworthy during the said voyage, the said goods on board thereof were greatly damaged, lessened in value and spoiled, and also by means of the premises, afterwards, to wit, on, &c. at, &c. and on divers other days and times between that day and the day of exhibiting the bill; it became and was necessary to repair and refit the said ship, and the said defendants have been forced and obliged to lay out and expend, &c. in and about the repairing and refitting of the said ship; and the said ship being so infested with the dry rot, &c. is likely still to continue unseaworthy as aforesaid, and soon to require to be again repaired. The second count was confined to the false representation that the ship had been built in the year 1816, of the best *British* oak. — And a third count alleged the deceit to consist in the misrepresentation that the ship had been built in 1816, alleging that in truth and in fact the said ship had not been built in the year 1816. There were also other special counts in the declaration.

In the year 1817, the ship *Beaufort* was offered to sale, and in the hand-bills and advertisements which were circulated, the ship was described as of 400 tons burthen, as having been built at *Chepstow* in the year 1816, of the best *English* oak, copper fastened, &c.

In the register the ship was described to have been built at *Chepstow* in the county of *Monmouth*, in the year 1816, as appeared by the certificate of *Bowsher, Hodges, &c.* (the defendants) dated *February* 1st, 1817. By the contract of sale, the
plaintiffs

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plaintiffs agreed to buy the ship on the terms specified in the register and inventory annexed. In the inventory was this clause : — the ship and stores to be taken with all faults as they now are, without any allowance for weight, length, quality, or any defect whatsoever. It appeared that the ship had been completed for launching in the year 1815, and that after having been launched in the *October* of the same year, she had been placed in a mud dock within the reach of the tide. When the plaintiffs intended to purchase her, they had a survey made, and one of the surveyors stated in his evidence, that in making a valuation of a ship, he usually deducted according to a *per centage* for every year of her age. Much evidence was also given by the plaintiff to shew that the ship had received great injury from having been left for many months in a mud dock, and that the timbers were in a very rotten state at the time of the sale.

Scarlett, for the defendant, in answer to this case, proposed to shew that the vessel had been built of the best oak which the west of *England* produces, that it had been selected from a great quantity of wood, and that the defects in the timbers were not substantive ones since the parts might easily be cut out and replaced. He also contended, that the variation as to the time of building the ship was not material, particularly since the plaintiffs had purchased the ship as she was with all defects : but

ABBOTT

ABBOTT Ld. C. J. was of opinion, that, on the evidence already given, the plaintiff was entitled to a verdict independently of any consideration as to the quality of the materials. The contract represented the vessel to have been built in 1816, but she had in fact been launched the year before. She had therefore been purchased by the plaintiffs, who depended upon a false representation thus held out to them. One of the witnesses had said, that, if he had known that the ship had been built in the year 1815, he should have put a different valuation upon her. A person ought either to be silent or to speak the truth, and, in case he spoke at all, was bound to disclose the real fact.

Verdict for the plaintiff, subject to a reference as to the amount of the damages.

Marryatt, Gurney, and Campbell for the plaintiffs.

Scarlett, Gaselee, and Puller for the defendants.

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IN THE COMMON PLEAS.

HUMPHRIES and Another v. WILSON.

A., shortly before his bankruptcy, on being applied to by *B.* to whom he owed 47*l.* to pay the debt, gave him a bill of exchange to get it discounted to pay his own debt and pay over the surplus. Before the bill is discounted *A.* becomes a bankrupt, *B.* cannot retain the bill against the assignees.

TROVER by the plaintiffs as the assignees of *William Judgson Bantock*, a bankrupt, to recover damages for the conversion of a bill of exchange for the payment of 100*l.* drawn by the bankrupt upon and accepted by *William Bulkeley*.

It appeared in evidence, that the bankrupt, being indebted to the defendant to the amount of 47*l.* and being called upon for payment, said that he had the bill in question and would pay him if he would procure the bill to be discounted. The defendant asked for a few days in order to make inquiry as to the responsibility of the acceptor. After several days had intervened, the defendant said that the inquiries which he had made were not satisfactory, and further time was given him for the purpose of inquiring after another person whose name was upon the bill. In the meantime *Bantock* became a bankrupt, and the defendant afterwards

afterwards refused to give up the bill to the assignees, telling them they might resort to their action.

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Vaughan Serjt., for the defendant, contended that there was no proof of a conversion of the bill. *Bantock* was a debtor to the defendant, and the property in the bill had passed from *Bantock* by his indorsement of the bill. In case the defendant had received the amount of the bill by procuring it to be discounted, he would have been a trustee for the surplus after paying his own debt.

DALLAS C. J., in charging the jury, observed that there were two questions for their consideration. First, for what purpose the defendant had consented to receive the bill, since to that event only had he a right to detain it. If he was, by the original agreement, to retain the bill till the debt was satisfied, then certainly he had a right to keep it as against the assignees; but, if he was to convert it into cash and deduct the difference, then, since possession was given for that special object which had not been performed, he had no right to detain the bill. The question was, whether the bankrupt had parted with the security wholly and at all events, or merely for a specific purpose. The evidence was all on one side; the bankrupt had proved that the agreement was not that the bill should be retained as a security, but that it should be discounted, and on being applied to for the bill,
the

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the defendant had refused to give it up, and sent the parties to their action.

Verdict for the plaintiff.

Lens Serjt. and *Starkie* for the plaintiff.

Vaughan Serjt. for the defendant.

PAYNE v. BRANDER.

A. by the direction of *B.* purchases coffee for *B.*, which is to be delivered at Leghorn to *B.*'s order. The coffee is accordingly sent to Leghorn and is sold there by *A.*'s agents, and by his direction, *B.* may maintain trover against *A.* for the conversion of the coffee, although the price has not been actually tendered to *A.*

TROVER to recover the value of 280 bags of coffee.

The plaintiff gave the defendant, *Brander*, who resided in *London*, an order to purchase coffee for him at *Rio Janeiro* to the amount of 1500*l.* sterling, to be shipped in the *Bonetta*, which was chartered by the defendant, and to be carried to *Leghorn*, and there to be delivered to some agent to be appointed by the plaintiff. After the making of this contract, the defendant effected policies of insurance on the coffee in the name and on the behalf of the plaintiff. The coffee was bought by the defendant's correspondents at *Rio Janeiro*, and shipped in the *Bonetta* to *Leghorn*, where it had been sold by *Fletcher, M'Gee, and Co.* the defendant's agents. After the sailing of the *Bonetta*, the defendant said in conversation, that he had received advices from his agents at *Rio Janeiro*, that the plaintiff's coffee had been purchased, and would be shipped by the *Bonetta*, and would be

laid down at *Leghorn* at 75s. per cwt.; that the invoice and bill of lading had not arrived, but that they were expected by the next packet. It also appeared, that a bill of lading had been received by the defendant, in which the coffee was specified, and the letter P. placed opposite to it, in order to denote that it was the coffee purchased on account of the plaintiff. After this the defendant had said, that *Barter* and Co., his agents at *Rio Janeiro*, had declined making the purchase, and at his instigation the plaintiff procured the stamp duties upon the policies to be returned at the stamp office.

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Copley S. G. on the part of the defendant, objected that the facts did not shew a tortious conversion. No agent had been appointed by the plaintiff at *Leghorn* to receive the goods on his account, and they were of course delivered to Messrs. *Fletcher* and Co., the agents of the plaintiff; and neither the plaintiff, nor any agent for him, was entitled to the possession of the goods until the price had been tendered, or at least until it had been shewn that he was in a condition to offer payment. The coffee had been sold by the defendant's agents, and they held the proceeds for the parties entitled to them, and they were ready to account for them.

ABBOTT Ld. C. J., in summing up to the jury, observed to them, that the question was whether the plaintiff was entitled to recover the value of

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the coffee upon the count in trover, for although there was a count in the declaration founded upon a tortious refusal on the part of the defendant to deliver the bill of lading to the plaintiff, that count appeared to be out of the question. The plaintiff had given directions to the defendant to write to his agent in *Rio Janeiro*, to purchase 280 bags of coffee for the plaintiff, to be sent to the *Mediterranean*. That order had been executed, for it appeared that the defendant had received advice from *Barter* and Co. that they had made the purchase, and that the coffee would be laid down at *Leghorn* at the rate of 75s. per cwt. including freight and other charges. That the coffee had been consigned to any person to be appointed by the plaintiff, and marked with the letter P. The ship had arrived at *Leghorn*, and it also appeared that an insurance had been effected on the goods by the defendant in the name of the plaintiff. This was sufficient in point of law to shew that the property in the goods had vested in the plaintiff; if they had been lost in the course of the voyage, he must have borne the loss. The only question then was, as to the conversion of the coffee by the defendant; if the sale had been made by his agents the question for the consideration of the jury was, whether the sale had been effected by *Fletcher* and Co. by the direction of the defendant. The defendant had directed the captain of the *Bonetta* to go to *Fletcher* and Co. at *Leghorn*, from whom he was to receive further orders. *Fletcher* and Co. had transmitted the account of sales made by them to

to the defendant, and after this the defendant had advised the plaintiff to get the stamp duty upon the policies returned. It was for the jury, under all the circumstances of the case, to say whether the sale had not been effected according to directions from the defendant.

Verdict for the plaintiff.

Scarlett, Gurney, and Campbell for the plaintiff.

Copley S. G. Chitty, and Tyrrell for the defendant.

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ROBERTSON v. CARUTHERS.

ACTION on a policy of insurance on the *Lady Castlereagh*, from the termination of her outward voyage at *New South Wales* to any of or all the *East India* islands, the *East Indies*, *Persia*, or elsewhere, &c. until her arrival at her last station of discharging her homeward cargo in *Europe*.

The *Lady Castlereagh* had arrived safely at *Madras*, where she had been chartered to the governor for the conveyance of troops to *England*. A monsoon arising, she was obliged to put out to sea, and afterwards proceeded to *Madras* and *Cuddalore*, where she arrived in so very shattered con-

If a vessel be so shattered by a storm that in the opinion of the master who exercises a fair and honest discretion on the subject, she cannot, without imminent peril to the lives of the crew, proceed on her voyage, and cannot be repaired but at an expence exceeding the amount of a

total loss, and he accordingly abandons and sells her, the owner may recover from the insurer as for a total loss, although it eventually turn out to be possible that the vessel might have proceeded.

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dition,

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dition, that it would have been impossible to proceed further without the most imminent risk of the lives of the crew. A survey was made of the ship, and it was found that she could not be repaired at a less expence than 30,000*l.* ; upon which the captain sold her on account of the underwriters, having calculated that the expences of repairing would considerably exceed that of a total loss.

On the part of the defendant it was insisted, that the captain might, notwithstanding the injury done to the ship, have proceeded to *Bengal* and *Trincomalee*, and have had the ship repaired, and that it was not competent to the plaintiff to convert an average into a total loss, by condemning and selling the ship. The effect of such a proceeding was to throw the whole of the burthen on the underwriter, whereas if the captain had proceeded on the voyage, the loss must have been borne in proportion by the owners of the cargo and of the freight. It was urged that the ship had remained at *Cuddalore* two months, and that she had afterwards actually conveyed a cargo to *Calcutta*.

ABBOTT Ld. C. J. The question is not whether by possibility, if a different conduct had been pursued by the master, the ship might not eventually have been saved, but whether, exercising the best discretion he could upon the subject matter, he was not justified in abandoning the ship without entering into a nice and minute calculation. He certainly must not act hastily and at random, he
must

must exercise the same judgment and discretion as if the ship had been uninsured.

Verdict for the plaintiff.

Scarlett and Pollock for the plaintiff.

Copley S. G. for the defendant.

See *Dacosta v. Newnham*, 2 T. R. 408. 1 Camp. 541. Thomson
v. Rowcroft, 4 East. 34. *Leatham v. Tovey*, 3 B. & P. Macarthy
v. Abel, 5 East, 388. *Everth v. Smith*, 2 M. & S. 278.

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ROBERTSON v. MARJORIBANKS.

POLICY of insurance on freight, valued at 10,000*l.* of the ship *Lady Castlereagh*, on her voyage from *New South Wales*, to her port or ports of discharge and loading in *India* and the *East India* islands, during her stay and loading there, and from thence to her port or ports of discharge in *Europe*. — Loss by the perils of the seas. — By a memorandum to the policy it was declared and fully understood, that in the event of the ship being lost previous to her loading in *India* for *Europe*, a settlement should be made as if she had on board an entire homeward freight, and no other proof of interest whatsoever should be required in the event of such loss but the production of the said policy.

amount of 2500*l.* on her voyage from *A.* to *B.* and is lost at *B.*, the assured cannot recover for a greater loss than 7500*l.*

Insurance on freight on a voyage from *A.* to *B.*; a 2d, Insurance on freight valued at 10,000*l.* on a voyage from *A.* to *B.* and thence to *C.*, with a memorandum that if the ship should be lost at *B.* a settlement should be made as if she had had on board an entire freight to *C.* The ship earns freight to the

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It appeared, that after the *Lady Castlereagh* had completed her outward-bound voyage to *New South Wales*, the captain had made a contract with the governor to proceed with convicts to *Van Dieman's Land*, and from thence to convey troops, women and children to *Madras*, and that the vessel had completed the voyage to *Madras*, and had thereby earned 2500*l.* It also appeared that the plaintiff had effected policies to secure the fruits of the voyage to *Madras* at the rate of 40*s. per cent.* and that the present defendant had been one of the insurers upon that policy. In expectation of freight to be procured from *Madras* to *England*, the present policy had been effected; the vessel had been driven from the *Madras* roads by a monsoon, and it was not disputed in the action that she had afterwards been lost through perils of the seas.

Before this a charter-party had been executed for the conveyance of troops from *Madras* to *England* for the sum of 10,000*l.*

It was contended on the part of the defendant, that the plaintiff was not entitled to recover for a greater loss than 7500*l.*, since the sum of 2500*l.* had actually been earned by the voyage from *New South Wales* to *Madras*.

On the part of the plaintiff it was alleged, that the latter insurance upon which the present action was brought, had been effected entirely with a view to the latter voyage from *Madras* to *England*, and that the special memorandum had been introduced solely with that view. That the sum of

40*s.*

40s. *per cent.* had been paid to the defendant for the insurance, to the amount of 2500*l.* from *New South Wales*, to *Madras*, and 5 guineas *per cent.* on the subsequent voyage, and therefore that the whole sum insured by the two policies was to be considered to be 12,500*l.*, that otherwise the plaintiff would in fact have been paying at the rate of 7*l.* 5s. *per cent.* on the voyage from *New South Wales* to *Madras*, or at least that the plaintiff was entitled to a return of the premium on the first voyage. It was proposed to give evidence to shew that the intention of the plaintiff to insure to the amount of 10,000*l.* on the latter voyage had been communicated to the underwriters, and that the memorandum had been introduced with their concurrence for the purpose of effectuating their object.

Mr. *Hathaway*, the first underwriter upon the policy, having been called as a witness, stated that such a communication had been made to him.

It was objected that this was not evidence against the defendant, who was a subsequent underwriter, unless it could be shewn that the communication had been made to him.

Scarlett, for the plaintiff, insisted that a communication to the first underwriter was a communication to all.

ABBOTT *Ld. C. J.* It is a communication to all for their benefit, but can you charge one under-
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writer

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writer by means of a communication made to another?

The plaintiff failed in proving that any such communication had been made to the defendant.

ABBOTT Ld. C. J. Here is a policy which covers the freight from *New South Wales* to *Madras*; if the ship had been lost between the two, the insurer would have been liable to the loss of the freight. It is of infinitely greater importance to abide by the terms of a written instrument, although the object of the parties may be frustrated in particular instances, than in every case to enter into a discussion of the motives and intentions of the contracting parties. I am of opinion that the policy would have been sufficient to cover a loss if it had taken place between *New South Wales* and *India*, to the amount of 10,000*l.*, and since the defendant must have paid such a loss, he is entitled to have the sum of 2500*l.* which has been received, deducted from the 10,000*l.*

Verdict accordingly.

Scarlett and *Pollock* for the plaintiff.

Copley S. G. for the defendant.

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CULLEN v. MORRIS.

THIS was an action on the case against the defendant as the high bailiff of the city of *Westminster*, for refusing the vote of the plaintiff at the election of a citizen for the city of *Westminster* for the parliament.

The first count of the declaration recited the writ out of Chancery, directed to the sheriff of the county of *Middlesex* to cause such citizen to be elected, the sheriff's precept to the bailiff of *Westminster*, the delivery of the precept to the defendant, and then alleged as follows: By virtue of which said precept, and by virtue of the writ aforesaid, they the said citizens of the city of *Westminster* being in that behalf duly forewarned, to wit, on, &c. at, &c. before him the defendant, the bailiff aforesaid, were assembled to elect a citizen for the said city according to the exigency of the writ and precept aforesaid, and during that assembly to that intention and before such citizen by virtue of the writ and precept aforesaid, was elected, to wit on the day and year last aforesaid, at, &c. he the plaintiff then and there being an inhabitant householder of the parish of *St. George, Hanover Square*, in the said city and liberty of *Westminster*, and paying scot and lot, and entitled to give his vote for the choosing of a citizen for the city and liberty of *Westminster* aforesaid, according to the

Where the right of voting for a member to serve in parliament is in the inhabitant householders paying scot and lot, one who has been an inhabitant and has paid poor's rates for many years is entitled to vote, although the the poor's rates for three-quarters of a year are in arrear at the commencement of the election, no personal demand having been made upon the party of the rates due, and no written demand having been left at his house. At all events he is entitled to vote if he pay the rates during the election.

In an action against a re-

turning officer for refusing a vote, the malice of the defendant is an essential ingredient to support the action,

exigency

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exigency of the writ and precept aforesaid before him the defendant, bailiff of the dean and chapter of the collegiate church of *St. Peter*, at *Westminster*, as aforesaid, to whom then and there it did duly belong to take and allow the vote of him the plaintiff of and in the premises, was ready, and offered to give his vote for choosing *John Cam Hobhouse*, Esquire, a citizen for that parliament, by virtue of and according to the writ and precept aforesaid; and the vote of him the plaintiff then and there of right ought to have been admitted, and the defendant so being then and there bailiff as aforesaid, was then and there requested to receive and allow the vote of him the plaintiff in the premises: Nevertheless, he the defendant being then and there bailiff as aforesaid, well knowing the premises, but contriving and fraudulently and maliciously intending to damnify him the plaintiff in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him the plaintiff to give his vote in that behalf, and did then and there absolutely refuse to permit him the plaintiff to give his vote for choosing a citizen for that city and liberty to the parliament aforesaid, and did not receive, nor did he allow the vote of him the plaintiff for that election, and a citizen of that city was elected for the parliament aforesaid he the plaintiff being so excluded as aforesaid, without any vote of him the plaintiff then and there by virtue of the writ and precept aforesaid, to the injury, enervation, and

and destruction of the aforesaid privilege of him the plaintiff of and in the premises.

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In the second count the refusal was alleged as follows: And the said defendant being then and there bailiff as aforesaid, was then and there requested to receive and allow the vote of him the plaintiff in the premises. Nevertheless, he the defendant being then and there bailiff as aforesaid, well knowing the premises, but contriving and intending to damnify him the plaintiff in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him the said plaintiff from giving his vote in that behalf, and did then and there absolutely refuse to permit him the plaintiff to give his vote for choosing a citizen for that city to the parliament aforesaid, and did not receive, nor did he allow the vote of him the said plaintiff for that election, and a citizen of that city was elected for the parliament aforesaid, he the said plaintiff being excluded as before is set forth, without any vote of him the said plaintiff then and there by virtue of the writ and precept aforesaid, to the injury, enervation, and destruction of the aforesaid privilege of him the plaintiff of and in the premises aforesaid.

There were also several other counts in the declaration, which it is unnecessary to notice.

The plaintiff was a broker, residing at *Knightsbridge*, within the parish of *St. George, Hanover Square*. The election of a member to serve in parliament for the city of *Westminster*, in the place
of

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of Sir *Samuel Romilly*, commenced on the 3d of *March*, 1819. The plaintiff had been a rated inhabitant of the parish of *St. George, Hanover Square*, for many years, and had paid his poor's-rates up to the preceding month of *March*. In that month a new rate was made, and the plaintiff owed for three quarters of that rate, which were due at the preceding *Christmas*; the rate for the fourth quarter was not due at the time of the election. The collector of the rates had called at the house of the plaintiff in the preceding *October* for payment of the rates then due, but he had never made any personal demand upon the plaintiff, nor had he left any demand in writing at his house. For convenience sake the rates were usually collected half-yearly. It appeared from a recital in the stat. 51 G. 3. c. 156. and also by a resolution of a Committee of the House of Commons, that the right of voting in the city of *Westminster* was vested in the inhabitant householders paying scot and lot. On the 23d of *February*, (the election having commenced on the 15th) the plaintiff tendered his vote at the hustings, but because he had not paid the rates was rejected, and desired to go round to the high bailiff's box, where disputed votes were argued and decided upon. The plaintiff retired, and on the next day (*February* 24th) paid four quarters rates up to the *Lady-day* following inclusive. On the 27th of *February* the plaintiff again tendered his vote at the hustings and was again rejected, he then went round to the high bailiff's box, where his right to
vote

vote was canvassed before the high bailiff and the counsel for Mr. *Hobhouse*, who was a candidate, and for whom the plaintiff tendered his vote, insisted upon the plaintiff's right to vote, and cited the *Shaftesbury* case, a copy of which, extracted from the minutes of the committee on the *Shaftesbury* election, was given in evidence on the trial as follows :

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11th *February*, 1813.

Committee on the *Shaftesbury* election.

Resolved. — That they will proceed to hear the arguments of the counsel on the question, whether persons rated and not having paid the rates before the day of election, the rate having been legally demanded, and no fraud appearing on the part of the overseers, are disqualified from voting.

12th *February*, 1813.

Mr. *A.* and Mr. *B.* were heard in support of their construction of the resolution determining the right of voting in the borough of *Shaftesbury*.

Mr. *Nolan* was heard on the part of the petitioners, and contended that the words of the resolution of the House of Commons "paying scot and lot," meant rated and liable to pay scot and lot.

Determined,

That this committee does not confirm the resolution of the *Bridgewater* committee, on which the counsel have been heard, and that counsel for the petitioners be directed to proceed.

Determined,

13th *February*, 1813.

That having over-ruled the objections against the votes of the twenty-seven men on the simple ground

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ground of their not having actually paid the last rates when demanded, they will be considered as good votes unless other objections are made to them, which the counsel for the sitting members are at liberty to go into.

The poor relief book delivered in, &c.

Determined,

19th February, 1818.

That the votes of *James Atcheson*, *George Chitty*, *William Blandford*, and six others, who were rejected on account of non-payment of rates, ought to have been received and placed on the petitioner's poll.

The defendant acting under the advice of his solicitor, rejected the plaintiff's vote. Evidence was also adduced on the part of the plaintiff with respect to the conduct of the defendant with regard to other votes, with a view to shew that he had acted partially in excluding votes for Mr. *Hobhouse*, and in receiving those of persons similarly circumstanced for Mr. *Lamb*, the other candidate. On the part of the plaintiff, it was contended, that in case the evidence should be insufficient to convince the jury that the defendant had acted maliciously as alleged in the first count, yet, that still the plaintiff was entitled to a verdict, and to damages for the unlawful rejection of his vote, and Lord *Holt's* judgment in the case of *Ashby and White (a)*, and the cases of *Grew v. Milward*, *Drew v. Colton (b)* were cited in support of this position.

(a) 2 Ld. Ray. 938. 6 Mod. 46. 1 Salk. 19. 3 Salk. 17. Holt. 524.
1 Brown. 45. Ray. Ent. 370. (b) 4 Ld. 245.

On the part of the defendant, it was contended in the first place, that the plaintiff was not entitled to vote at all, inasmuch as he had not paid his rates for the space of six months before the commencement of the election. The stat. 26 Geo. 3. c. 100. enacted, that no person should be admitted to vote at any election of a member to serve in parliament for any city or borough, &c. as an inhabitant paying scot and lot, &c. unless he shall have been actually and *bonâ fide* an inhabitant paying scot and lot, &c. six calendar months previous to the day of election. It had always been held under the construction of this act, that the party must have his elective character complete, before the day on which the election shall commence.

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In the *Bridgewater* case (a) it had been held, that persons rated and not having paid the rates before the day of election, the rates having been legally demanded and no fraud appearing on the part of the overseers, are disqualified from voting. Under this authority the high bailiff had acted. The *Fowey* case was also referred to as being a late decision of a committee of the House of Commons to the same effect. It was also contended, that the malice of the defendant was a necessary ingredient in the action. In the case of *Sargeant v. Milward* (b), express malice was proved, and the malice of the party made a part of the

(a) 1 Peck. 108. Orme's Digest, 242. See also the *Seaford Case*, 1792. Simeon. 129. 2d. ed. Orme's Digest. 2d. ed. 251.

(b) Luders. 248.

plaintiff's

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plaintiff's case upon the proceedings in error. In *Drew v. Colton*, which was an action for maliciously refusing the plaintiff's vote; the counsel for the plaintiff having in the opening, declared that he did not mean to charge the defendant with any thing malicious in the refusal of the vote, but only with the mere refusal, the defendant's counsel objected to the competency of the plaintiff's proceeding with his evidence, upon the ground of the admission on his part, that the defendant had done nothing wilfully wrong; alleging, as the plaintiff's counsel admitted, that he had acted conformably with the usage for the last thirty years, and to three concurring decisions of election committees. And in that case the learned judge was of opinion that he ought to direct a verdict to be taken for the defendant, or the plaintiff to be nonsuited without proceeding further. In that case his Lordship mentioned the case of General *Burgoyne* against *Moss* the mayor of *Preston*, which was an action for a false return. Upon the trial it appeared, that the mayor, who had acted by Mr. *Dunning's* advice upon that election, had conducted himself in the same manner as his predecessors had done, and that the class of votes then supported by the resolution of the House, had never been received at any former election. Lord ———, who tried the cause, upon this evidence, directed the jury to find for the defendant, if they should think that in the execution of his duty, he had acted according to the best of his judgment, and not maliciously, and they gave
a verdict

a verdict for the defendant. Mr. J. *Wilson* in the same case also observed, that *Ld. C. J. Holt*, in the case of *Ashby v. White*, had endeavoured to establish a different opinion, *viz.* that an action lies for the mere obstruction of the right, but that the decision in the House of Lords had been founded upon a different principle, *viz.* the wilfulness of the act.

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ABBOTT *Ld.* C. J., after stating the pleadings to the jury, observed in his charge to them — In order to sustain this action, it is necessary for the plaintiff to shew in the first place that he had a right to vote at the election. In order to prove this, he has produced an extract from the resolutions of a committee of the House of Commons, from which it appears that the right of voting is in the inhabitant householders, paying scot and lot, of several parishes, one of which is the parish of *St. George, Hanover Square*, within which *Knightsbridge*, the place of the plaintiff's residence, is situated. It is also proved, that the plaintiff had been an inhabitant of the parish for many years, and that he had never refused to pay the poor's rates when he was personally called upon. That a rate was made in *March* 1818, of which no part had been paid when the election commenced. The high bailiff had been informed that the rate had been demanded but had not been paid; when the matter came before him, which was upon the plaintiff's second application to vote, the plaintiff having in the first

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instance tendered his vote to the poll-clerk, who told him that there was an objection to his vote, but that he might go round if he chose to the high bailiff and have the point argued. The plaintiff upon this rejection went and paid all the rates which were due, and again tendered his vote to the poll-clerk; his vote was again refused by the poll-clerk, and the plaintiff then went to the high bailiff, and the question was argued. On the part of the defendant it is contended, that according to the true construction of the act of 26 G. 3. c. 108. the plaintiff had no right to vote. Every question as to the right of voting is for the peculiar consideration and determination of the House of Commons, and no decision in any court of law is at all binding upon that house. Upon the present occasion, however, it is necessary that I should state my opinion in point of law as to the right of voting, and that opinion is, that the plaintiff had a right to vote. He had paid the poor's-rates for several years; there had been no personal demand of the rates which were due, and no written paper, containing a demand of the rates, had been left at his house, although an application had been made at the house. It appears to me, therefore, that he had a right to vote, and that he had that right at all events upon his second application and tender of his vote. I have stated this my opinion on the preliminary point of law, in order that the counsel for the defendant if they are dissatisfied with it, may, if it should be necessary, apply to the court.

Then

Then if the plaintiff had a right to vote, the question is whether the action be maintainable under the circumstances of the case. On the part of the plaintiff it has been contended, that he has a maintainable right of action without at all referring to the motives by which the defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant. On the part of the defendant it has been contended, that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment, he is not amenable in an action for damages. I am of opinion, that the law, as it has been stated by the counsel for the defendant, is correct. The returning officer is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of a mixt nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action. It has been urged, that Lord *Holt*, who with great honour to himself once filled

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this seat, intimated his opinion that the mere refusal of the vote of a person entitled to vote, would give the party a right to sue the returning officer. Whether he ever did say so or not, we do not certainly know, for the reports of that case are very imperfect. No one entertains a greater veneration for that learned judge than I do, but if he did so express himself, I am bound to deliver my opinion that he was mistaken. The case alluded to (*Ashby v. White*) had been tried by a jury, and upon the face of the record the defendant was charged with malice, and when a writ of error was brought, the record itself was conclusive as to the malice of the defendant, since the Court could look at nothing beyond the record. The next case which has been alluded to, is that of *Grew v. Milward*, and there the declaration charged the defendant with having wilfully and maliciously refused the vote of the plaintiff, and there the jury found a verdict for the plaintiff with considerable damages, amounting to 300*l.*, from which it appears that the defendant had conducted himself very maliciously. A writ of error was then brought, but the averment of malice was upon the record, and ultimately the writ of error was abandoned. The next action was brought, not by the party whose vote had been refused, but by a candidate, and it was brought against the returning officer for having refused votes tendered on behalf of the plaintiff, and having returned another candidate.

That action was founded upon the stat. of *W. 3.*, and that statute gives a right of action in those

those cases only where the act of the defendant is wilful.

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A case afterwards came on to be tried before Mr. Justice *Wilson*, on the western circuit, (*Drew v. Colton*) which had been brought by the plaintiff against the defendant for having refused to admit his vote. It was admitted by the counsel for the plaintiff, that the plaintiff was one of a class of persons who had not for a length of time been allowed to vote, and it was held that the action was not maintainable, because the defendant had done no more than that which his predecessors had done. If a vote be refused with a view to prejudice either the party entitled to vote, or the candidate for whom he tenders his vote, the motive is an improper one, and an action is maintainable. The question for your consideration is, whether the refusal of the vote in this instance, was founded on an improper motive on the part of the defendant, it is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty acting under professional advice.

If he intended to do prejudice either to the plaintiff or to the candidate for whom he meant to vote, the plaintiff is entitled to your verdict; if on the other hand he acted in the best way he could according to his judgment, your verdict ought to be for the defendant. His Lordship then read the evidence, and commented fully upon all the facts of the case.

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The jury retired to consider their verdict, and after being absent for a considerable time, sent a message stating that they were not likely to agree, and ultimately it was agreed between the parties, that a juror should be withdrawn.

Blackburn and Evans for the plaintiff.

Scarlett, Gurney and Tindal for the defendant.

HORNCASTLE v. FARRAN.

Freight is to be paid for in good bills, and bills are given by the charterers which are put into circulation by the ship-owners, this amounts to an acceptance of the bills and discharge the lien. And an application to renew such bills on condition that the lien shall remain, will not operate to the continuance of the lien, unless the charterers knew that the bills had been circulated.

TROVER against the defendant as clerk of the *East India Dock Company*, to recover the value of a cargo of silk which had been deposited in the *East India Company's* warehouse.

Horncastle and Co. were the owners of the ship *Kingston*, which had been chartered by *Campbell*, and *Barlow*, the captain of the vessel to the *East Indies*. By the terms of the charter-party, part of the freight was to be paid during the voyage, and the remainder was to be paid in good bills payable in *London* three months after date, on the delivery of the homeward cargo. The *Kingston* arrived on the 15th of *September*, 1818. On the 6th of *October* her cargo was discharged and deposited in the warehouse of the *East India Dock Company*. On the 21st of *October*, the amount of the freight was adjusted at 3000*l.* with the exception

of

of two trifling articles which remained still unadjusted.

Bills of exchange were given to the plaintiff's agents to the amount of the freight, two of which had been accepted by *Allington* and *Brant*, friends of the charterers, and a bill for 1200*l.* had been accepted by *Barlow*. At the time when this bill was given, the agent of the plaintiff observed that it was not negotiable, and that the plaintiff would look for further security. The *East India* Dock Company had received notice not to part with the goods till they received advice that the freight had been paid. Application had been made by the charterers to have some of those bills renewed, and assurances were given that they would be paid.

It was at first contended on the part of the defendant, that although part of the goods had been given up to the charterers, yet that goods still remained of a value sufficient to satisfy the plaintiff's claim for freight, but

ABBOTT Ld. C. J. was clearly of opinion that the plaintiff being entitled to a lien on the whole as a security for their demand might insist on the whole being retained for that purpose.

It afterwards appeared that the plaintiffs had put the different bills which they received into circulation. On the part of the plaintiff it was contended that this made no difference, an offer having been made by the charterers to cash one of the bills which had been so delivered, and evidence

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having also been given of applications made to the plaintiff to renew the bills, and that the lien on the goods should still remain. The case of *Stevenson and another v. Blakelock*, 1 M. & S. 305. was cited. There a party gave his attorney a specific sum to satisfy an execution against his goods, and the attorney having paid the money, received from the creditor a lease which had been deposited with him as a security for the debt, and it was held that the attorney had a lien on the lease for his general balance due from the client, and that the lien was not extinguished by his having taken acceptances from the client to the amount of the balance before the lease came into his hands; some of those acceptances, when the lease came into his hands, having been dishonoured, and one of them taken up by the attorney.

ABBOTT Ld. C. J. was of opinion, that the case cited was very distinguishable from the present, where the payment was to be in bills, and where the lien was to cease on the payment of bills approved of by the owners. Without a positive consent that the lien should remain, the putting the bills into circulation amounted to an acceptance of the bills, and determined the lien. There was no evidence to shew that at the time when the application was made to renew the bills, and that the plaintiffs should still retain their lien, the charterers knew that the bills had been put into circulation, the difficulty is whether they consented that their friends should be liable on the bills and yet that
the

the lien should still remain. It was incumbent on the plaintiffs to shew that the charterers knew this at the time when such application was made.

No evidence to this effect being adduced, the plaintiff was nonsuited.

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Scarlett and Chitty for the plaintiffs.

Marryatt and Gurney for the defendant.

*A rule nisi was obtained in
Hilary Term to set this writ
aside but in Easter Term 1820
that rule was discharged
by Harmerall & Co. R. 10
Term p. 497.*

ADDENDA.

P. 159. the name of Mr. *Richardson*, as one of the counsel for the Crown, was accidentally omitted.

WINDHAM v. PATERSON, Vol. I. 144. reported also, 4 *Camp.* 286. I have understood that the decision in this case has since been doubted.

TAYLOR v. KINLOCH, Vol. I. 176. In *Trin. Term*, 1819, *Bayley* J. mentioned the case there cited, and stated that he had nonsuited the plaintiff for want of evidence to shew the existence of the bill previous to the bankruptcy, and that the Court of King's Bench afterwards held that the nonsuit was right.

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ABATEMENT.

Upon a plea in abatement for non-joinder of another, as defendant in assumpsit, the counsel for the plaintiff is to begin. Evidence to sustain the plea. *Robey v. Howard*, Page 555

ACTION.

A. agrees to supply *B.* with a manuscript work to be printed by *B.*, the profits of which are to be equally divided. *B.* may maintain an action at law against *A.* for refusing to supply the manuscript. For this is not an action for partnership profits, but for refusing to contribute the labour of the defendant towards the attainment of profits. It would be a good defence to such an action, to shew that the intended publication was of an illegal nature; but this is not to be presumed, the work itself not being produced. *Gale and another v. Leckie*, 107

ACTION ON THE CASE.

1. In an action against the defendant for the negligence of his agent in pulling down the party-wall between the houses of the plaintiff and defendant, it is a good defence to shew that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. *Hill v. Warren*, Page 377
2. If, when danger occurs, the driver of a stage-coach does not take the safest course, the coach-owner is responsible for the mischief which ensues. *Jackson v. Tollett*, 37
3. In a declaration for keeping a dog which killed several of the plaintiff's sheep, it is alleged, that the defendant knew that the dog was accustomed to bite and kill sheep. Proof must be given that the dog had previously bit sheep, and the fact cannot be inferred from the circumstance of the dog's having before sprung upon a man. *Hartley v. Halliwell*, 212
4. *A.*

4. *A.*, with intent to seduce the servant and daughter of *B.*, hires her as his servant, and by this means obtains possession of her person. *B.* may maintain an action against *A.* for such seduction. *Speight v. Oliviera*, Page 493

5. Where the right of voting for a member to serve in parliament is in the inhabitant householders paying scot and lot, one who has been an inhabitant and has paid poor's-rates for many years, is entitled to vote, although the poor's-rates for three quarters of a year are in arrear at the commencement of the election, no personal demand having been made upon the party of the rates due, and no written demand having been left at his house. At all events he is entitled to vote if he pay the rates during the election.

In an action against a returning officer for refusing a vote, the malice of the defendant is an essential ingredient to support the action. *Cullen v. Morris*, 577

ADMINISTRATOR.

A lease which belonged to an intestate, upon which the plaintiff has a lien, on account of which he retains it in his hands, is nevertheless to be considered as assets in the hands of the administrator, who has the power to redeem it. *Vincent v. Sharp, Administratrix, &c.* 507

AGENT.

A master is not responsible for liquors ordered by his butler in the name of the master, but without his authority, unless he has on former occasions paid for goods

ordered by him, or there is some other evidence, to shew that the butler had authority for what he did. *Maunder and another v. Conyers*, Page 281

AGREEMENT.

1. Agreement to let a house for a year, the rent to commence at *Michaelmas*, and to be paid three months in advance, such advance to be paid on taking possession: Semble this stipulation relates to the first quarter's rent only. *Holland v. Palser*, 161
2. *A.*, in London, engages not to open a shop for business within one mile of *B.*'s shop, he estimating the distance, the shortest way of access by the footpath is to be taken. *Woods v. Dennett*, 89
3. One who has agreed for the sale of 100 sacks of flour, cannot, after the delivery of part, recover for that part, the defendant being willing to receive and pay for the whole. *Walker v. Dixon*, 281

ASSUMPSIT.

1. A declaration in assumpsit against an auctioneer, for having rescinded a contract of sale (which he had made), contrary to his duty as auctioneer, may be supported by implication of law arising upon the facts of the employment of the auctioneer by the plaintiff, and his sale of the goods, without proof of an express contract on his part not to rescind the contract. In such case, it is incumbent on the defendant to establish a legal excuse for deviating from the usual practice, although the proof involve the proof a negative. *Nelson and another v. Aldridge*, 435
2. Declar-

2. Declaration on a promise by the defendant to pay over to the plaintiff the amount of a bill of exchange, delivered to him by the plaintiff, to get discounted.—The defendant having paid the bill in discharge of a debt of his own, is liable to the plaintiff as if he had discounted the bill. *Oughton v. West*, Page 321
3. *A.* deposits goods in the warehouse of *B.*, a wharfinger, for the purpose of sale by *B.*, who is paid 10*l.* per annum for warehouse rent, and receives a commission on the sale. *B.*, having insured the goods, which are afterwards burnt in the warehouse, and having received the amount from the insurer, is liable to *A.* for so much money had and received to his use.—*A.* deposits goods in the warehouse of *B.*, a wharfinger, and pays an annual rent for part of a particular warehouse, *B.* removes the goods into another warehouse, where they are burnt: *qu.* whether *B.* is liable to *A.* for the amount. *Sideways and another v. Todd and another*, 400
4. *A.* having paid to *B.* the whole of a demand claimed by *B.*, but part of which is due to *C.*, *B.* afterwards engages to indemnify *A.* against any claim by *C.*, this promise is supported by a sufficient consideration, although it was made after the payment of the money. *Lord Suffield v. Bruce*, 175
5. *A.*, a malster, sends malt to *B.* the purchaser, which is conveyed in *C.*'s barge, and is delivered to *B.* in sacks belonging to *C.*; *B.* requests that the sacks may be left for his own convenience, and engages to return them within a reasonable time. The contract to return the sacks is between *B.* and *C.* *Terry v. Barker*, 172
6. Money paid in consideration of putting off the trial of a party upon an indictment for perjury, for which he is not prepared, cannot be recovered by his assignees, after he has become a bankrupt, from the prosecutors. In an action by the plaintiffs, *A.* and *B.*, as the assignees of *C.* v. *E.*, a notice to produce a document is entitled, *A.* and *B.*, assignees of *C.* and *D.* v. *E.*, this is insufficient, although *A.* and *B.* are, in fact, the assignees of *C.* and *D.* *Harvey and others v. Morgan and Another*, Page 17
7. One who professes to cure disorders within a specific time by means of sovereign medicines, and induces another to employ him by false and fraudulent professions of his skill, cannot recover for medicines or attendance. *Hupe v. Phelps*, 480

ATTESTING WITNESS.

1. When a warrant to distrain has been signed by an attesting witness, that witness must be called to prove it. *Higgs v. Dixon*, 180
2. Commission of 5 per cent. on the sum laid out allowed to a surveyor on a *quantum meruit*. *Chapman and others v. De Tastet*, 294
3. *A.* lends money to *B.* and receives a gun as a security for the repayment. *A.* may recover the amount without first returning the gun. *Lawton v. Newland*, 72
4. The plaintiff having paid an attorney the amount of his bill, cannot, after a reduction of the bill by taxation, recover the difference. *Gower v. Popkin*, 85
5. Declaration on a special agreement for the sale of a lease of a house in order to recover a deposit for the purchase, the supposed agreement being unstamped, but not having

having been signed by either of the parties, or by the auctioneer as their agent, the plaintiff may recover for money had and received.—In such case it is incumbent on the defendant to shew that when the deposit was demanded by the plaintiff, he tendered an assignment of the lease. *Adams v. Fairbain*, Page 277

6. *A.* engages to indemnify *B.* against a debt due from *A.* and *B.* to *C.* of 50*l.*; *A.* and *B.*, in fact, owe *C.* 74*l.* and *C.* refuses to accept 50*l.* from *A.* without payment of the remainder of his debt; and *C.* arrests *B.* for the whole debt. *A.* is liable to *B.* on his engagement to indemnify him. *Hancock v. Glay*, 100

7. *A.* sells beer to *B.* in casks, giving him notice that unless he returns the casks in a fortnight he will be considered as the purchaser: *B.* does not return them within a fortnight; *A.* cannot maintain an action for goods sold and delivered, the whole resting in special agreement. *Lyons and Another v. Barnes*, 39

8. A purser's steward on board one of His Majesty's ships cannot recover wages from the purser, upon an implied contract, for his services as such on board the ship. *Carter v. Hall*, 361

9. If a servant hired for a year refuse to obey his master's orders, the master is justified in dismissing him before the end of the year, and the servant cannot recover any wages. *Spain v. Arnott*, 256

10. Assumpsit and plea of set-off for money lent by the defendant to the plaintiff. Replication, denying the set-off. It appears that the loan took place thirteen years ago. Although the statute of limitations

is not a legal bar to the action, the jury may presume from length of time and other circumstances, that the debt has been satisfied. *Cooper v. Dame Turner, Widow*, Page 497

11. *A.* lends a picture to *B.*, who wishes to shew it to *C.* *B.*, without any previous communication with *C.*, and without his knowledge, sends the picture to his house, where it is accidentally injured: *C.* is not responsible in assumpsit for not keeping the picture safely:—Semble, whether *B.* is a competent witness for the plaintiff. *Lethbridge v. Phillips, Knt.*, 544

ATTORNEY.

1. If one item of an attorney's bill be for preparing a warrant of attorney to confess a judgment, a bill must be delivered according to the stat. 2 G. 2. c. 23. s. 23., although the warrant has not been executed. *Weld v. Crawford*, 538

2. It is no defence to an action by a solicitor against an assignee under a commission of bankrupt that the commission was sued out under a misrepresentation by the plaintiff that the commission would be operative in the *Isle of Man*, and that it has been wholly fruitless, for the commission cannot be treated as a mere nullity. *Pasmore v. Birnie*, 59

3. Although it is usual for the solicitor of the vendor of an estate, sold at a master's office, to procure the confirmation of the sale in the Court of Chancery, to the expence of which, the vendee is liable; the vendee may, if he choose, employ his own solicitor to transact the business. *Devon and Another v. Fricker*, 170

AUC-

AUCTIONEER.

A landlord having given notice to his lessee (under a covenant in the lease) that he would re-enter if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of sale. *Stevens v. Adamson*, Page 422

BANKRUPTCY.

1. The assignees under a joint commission against *A.* and *B.*, may, in an action to recover a debt due to *A.* alone, describe themselves in the declaration as the assignees of *A.* alone. *Harvey v. Morgan*, 17
2. In an action by the assignees of a bankrupt, where the proceedings under the commission, are read by virtue of the statute; a deposition, in which it is stated, that the deponent saw the bankrupt execute an assignment of all his effects, &c. is sufficient evidence of the act of bankruptcy, without producing the assignment. *Kay and Another v. Stead*, 200
3. A bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sell his estate and reversionary interest in the premises. This amounts to an acceptance of the lease by the assignees. *Page v. Godden*, 309
4. A bankrupt carries on the business of a coachmaker for the benefit of the creditors, as their agent, under the authority of the assignee, and orders goods in his own name, which are used in the business, the assignee is liable for goods bought for the use of

the business. *Kinder v. Howarth*, Page 354

5. In an action against the assignees of a bankrupt and their servants, the proceedings may be read in evidence, where no notice has been given under the statute, of the plaintiff's intention to dispute the bankruptcy, although there are other defendants on the record besides the assignees. *Gillman v. Cousins and Others*, 182
6. The nonjoinder of a joint assignee of a bankrupt, in an action of assumpsit brought by the assignees, is a ground of nonsuit upon the trial, under a plea of the general issue. *Snelgrove v. Hunt*, 424
7. A person who is interested in a commission of bankruptcy and the proceedings under it, is entitled to have them produced in a collateral cause. *Cohen v. Templar and Another*, 260
8. A defendant's liability as surety in a bastardy bond, is not discharged by his bankruptcy and certificate. *Parish of St. Martin v. Warren*, 188
9. *A.*, shortly before his bankruptcy, on being applied to by *B.*, to whom he owed 47*l.*, to pay the debt, gave him a bill of exchange to get it discounted, to pay his own debt and pay over the surplus. Before the bill is discounted *A.* becomes a bankrupt, *B.* cannot retain the bill against the assignees. *Humphries and Another v. Wilson*, 566

BANK NOTE.

- A.* takes a bank note in the course of his business, which he pays to *B.*; the note is afterwards stopped at the bank as a forged note, and is brought by an inspector to *A.*, who immediately pays to *B.* the amount



of the note, and refuses to give it up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he received it. The inspector, in the absence of all circumstances of suspicion, is not justified in charging *A.* before a magistrate with feloniously having the note in his possession, knowing it to be forged, for the purpose of compelling him to give up the note. — By possession, under the stat. 45 G. 3. c. 89., is meant the original possession of a note acquired in an illegal mode, and not a subsequent possession like the above, where the original possession was legal. *Brooks v. Warwick*, Page 389

BARON AND FEME.

1. Where the wife of the defendant alone transacts the business at home, and purchases all the articles used in their trade, her admission as to the state of the accounts between the plaintiff, who has supplied goods to her to be used in the trade, and her husband is evidence against the latter. *Anderson v. Sanderson*, 204
2. A husband who allows his wife a separate maintenance, promises to pay the amount of a debt which she contracts in a state of separation; he cannot afterwards recede from his promise, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he made the promise under a misapprehension of law. *Hornbuckle v. Hornbury*, 177
3. In an action against the husband for lodging and necessities supplied to his wife, who lives separately from him without any fault of her own, and who is possessed

of funds of her own, the question is, whether she has such means as are adequate to her support, according to her husband's situation in life. *Luddlow v. Wilmot*, Page 86

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *A.* accepts a bill for the accommodation of *B.*, which *B.* delivers to *C.* his creditor, to provide for a bill about to become due. *C.*, before *A.*'s bill becomes due, returns it to *B.* as useless, in order that it may be forwarded to *A.*, and abandons all claim upon the bill. *C.* cannot, by subsequently obtaining possession of the bill, acquire a right of action against *A.* — In such case *B.*, who has become bankrupt, is a competent witness for *A.*, after a general release by *A.*, although he has not been released by his assignees. *Cartwright and Others v. Williams*, 340
2. In an action by a second indorsee, against the drawer of a bill of exchange, payable to his own order, proof that the bill purported to have been accepted, when it was indorsed to the plaintiff, does not supersede the necessity of proving an actual acceptance. — The plaintiff in such case, must either allege and prove an actual acceptance, or charge the drawer with having drawn the bill upon a non-existing person. *Smith v. Bellamy*, 223
3. An instrument by which the party promises to pay the sum of 65*l.*, and also such other sum as, by reference to his books, he owed to another, with interest, cannot be considered as a promissory note, even as to the 65*l.*, and cannot be given in evidence under the count upon an account stated, without an

- an agreement stamp. *Smith and his Wife v. Nightingale*, Page 375
4. The drawee of a bill of exchange being advised of the drawing of the bill by the drawer, and requested to honour it, answers by letter that "the bill shall meet attention," this does not amount to an acceptance, although it appears that in other instances the drawee has used the same expression when bills have been drawn upon him. *Rees and Another v. Warwick*, 411
 5. The payee of a bill of exchange accepted as a security for *A.*, engages to renew it for three months more, if *A.* be not returned before the bill become due. If the acceptor, after the expiration of that time, make no application for a renewal of the bill, the payee may bring his action before the expiration of three months more. *Gibbon and Others v. Scott*, 286
 6. An acceptor of a bill of exchange, on an action brought against him by the payee, may shew that he accepted it for value as to part, and as an accommodation bill as to the rest. *Darnell v. Williams*, 166
 7. The drawer of a bill accepted for his accommodation, indorses it for value to his bankers, and before the bill becomes due, becomes bankrupt. The bankers, who knew that the bill was accepted for the accommodation of the drawer, cannot recover from the acceptor more than the amount of their balance, as between them and the drawer at the time of his bankruptcy. *Jones and Others v. Hibbert*, 304
 8. The indorsee of a bill in an action against the acceptor, alleges that the bill was directed to the defendant; this allegation is not supported by proof that the drawer drew the bill payable to his own order, at a specified place, although the defendant, when it was presented there, wrote his name upon it as the acceptor. *Gray v. Milner*, Page 336
 9. On the day after the drawing of a bill of exchange payable at sight, the payee leaves it with the drawer for acceptance; a month afterwards, the payee states that the drawee has refused to accept the bill, and resorts to other measures for obtaining payment of his debt from the drawer; in ten days after this the drawee announces to the payee that he has destroyed the bill, conceiving it to be of no use. The drawer is not liable as the acceptor of the bill, (by the three Judges, Lord *Ellenborough C.J. dissente.*) — Evidence of the time of birth. *Jeune v. Ward*, 326
 10. The drawer and payee of a bill of exchange, after it has become due, indorses it to *B.*, on condition that he will take up certain bills discounted by the payee. *B.* does not take up the bills, but transfers the bill in question to *C.*, the latter may recover against the acceptor. *Wright v. Hay*, 398
 11. Semble, the drawer of an inland bill of exchange is liable to pay interest on the bill which has been noted for non-acceptance, but not protested. *Windle v. Andrews*, 425
 12. The holder of a bill of exchange applies to the drawee on the day before the bill becomes due, who informs him that he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day. On the next day, the drawer informs the holder that he will endeavour to provide effects,

effects, and will call upon him again. This does not supersede the necessity of a presentment on that day. *Prideaux v. Collier*,
Page 57

13. A promissory note is made more than six years ago, and deposited with a banker, to be delivered to the payee, on his producing a certain other note cancelled. The cause of action to the payee on the first note, accrues on receiving it from the banker, and is not barred either by the lapse of six years from the date, or by the bankruptcy and certificate of the maker, which intervene between the date of the note and the time of its delivery to the payee. *Savage v. Aldren*, 232

14. *A.*, the drawer of a bill of exchange payable to his own order, being indebted to *B.* on another bill, for which he is bound to provide, indorses the first bill to *B.* to enable him to raise money upon it, in order to take up the second bill; this is an available security in the hands of *B.* in reduction of his demand on *A.*, and he may recover upon it against the acceptor. *Walsh v. Tyler*, 288

15. The indorsee of a bill, in action against the acceptor, having called a witness to prove the indorsement, who disproved it, the plaintiff was afterwards allowed to call the indorser himself to prove his own indorsement. *Richardson v. Allan*, 334

16. The maker of a promissory note by a note at the foot makes it payable at a particular place, an allegation (after stating the promise to pay in the usual manner) that the defendant then and there made the note payable at the particular place, does not amount to a mis-

description of the note. — A promissory note is made payable at *G.*, a presentment at a banker's at *G.*, the maker being absent from *G.* when the note became due, is sufficient evidence of a presentment to the maker at *G.* as alleged in the declaration. *Hardy v. Woodroffe*, Page 319

17. Action by the indorsee against the acceptor of a note, the date of which appears to have been altered by the acceptor, it lies on the plaintiff to shew that the alteration was made previous to the indorsement of the note by the drawer, to whose order it was made payable. *Johnson and Others v. The Duke of Marlborough*, 313

18. Although a bill drawn by a prisoner of war in *France* in 1795, upon a person resident in *England*, in favour of an alien enemy, could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace, to pay principal and interest. *Duhammel v. Pickering*, 90

19. Goods sold at three months' credit, the vendor agreeing to take the vendee's bill of exchange at three months' date, at the end of the first three months, if he wished for further time. Unless the vendee give such a bill at the end of the first three months, the vendor may bring his action immediately. *Nickson v. Jepson*, 227

20. An acceptor of a bill of exchange cannot avail himself of a renunciation on the part of the holder of his claim upon him, unless it be express, and founded upon some consideration. *Parker v. Leigh*, 228

21. In an action by an indorsee against the acceptor of a bill of exchange, the declaration alleges an acceptance, and an appointment by

by the acceptor to pay at a particular place, and a promise to pay according to the tenor and effect of the acceptance, and a special presentment; *semble*, the allegation of the presentment may be rejected as surplusage. *Macbridge v. Woodruffe*, Page 253

22. After a bill of exchange has been accepted, and whilst it remains in the hands of the payee, he alters it by making it payable at a particular place; this alteration will not vitiate the bill. *Jacobs v. Joseph Hart*, 45

23. The acceptance of a bill of exchange purports to bear the signature of the acceptor's Christian name as well as surname; proof of the latter, by a witness who never saw the acceptor write his Christian name, and had seen him write his surname once only, is not sufficient. *Powell v. Ford*, 164

24. The drawer of a bill payable to his own order, after the bill becomes due, settles with the acceptor, and gives him a receipt in full of all demands. The drawer being afterwards in possession of the dishonoured bill, an indorsee from the drawer cannot maintain an action against the acceptor. *Thorogood v. Clarke*, 251

25. A plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may shew by evidence that he was the person intended. *Willis v. Barrett*, 29

26. Freight is to be paid for in good bills; and bills are given by the charterers, which are put into circulation by the ship-owners. This amounts to an acceptance of the bills and discharges the lien; and an application to renew such bills on condition that the lien shall

remain, will not operate to the continuance of the lien, unless the charterers knew that the bills had been circulated. *Horncastle v. Farvan*, Page 590

BROKER.

1. *A.* consigns to *B.*, a broker, a quantity of hides, desiring him to act according to his discretion, and soon afterwards draws upon him for the amount, and *B.* accepts bills for the amount; *B.* is not entitled to pledge the goods in order to raise money to meet these bills, although it has been the usual course for *A.* to draw bills, and for *B.* to accept them, upon every consignment of goods. Although notice has been given to the plaintiffs to produce certain letters, the defendant cannot cross-examine the plaintiff's witnesses as to their contents. *Graham and Others v. Dyster*, 21

2. A broker, who procures a charter-party for a vessel to *Rio Janiero*, where a gross sum is to be paid for the voyage out and home, is entitled on a *quantum meruit* to 5 per cent. on the gross sum, although the payment of part be contingent on the arrival of the vessel home. *Roberts and Others v. Jackson and Others*, 225

CARRIER.

1. A promise made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, is not binding upon the carrier, unless the book-keeper be shown to be his general agent. *Olive v. Eames*, 181

2. In order to affect one who sends goods by a carrier with notice of the terms on which he deals, it is

not sufficient to shew that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read and had seen the notice, if in fact he had never read it. *Kerr v. Willan*, Page 53

3. A greyhound is delivered to a carrier, who gives a receipt for it; the greyhound being afterwards lost, the carrier cannot set up as a defence that the dog was not properly secured when delivered to him. *Stuart v. Crawley*, 323
4. A carrier, in order to avail himself of a notice limiting his responsibility, must bring notice of his intention home to the mind of the party. A notice stuck up in the office is insufficient, where the party cannot read. *Davis v. Willan and Others*, 279
5. In an action of assumpsit against a carrier for the loss of goods, where a contract is alleged to carry them from *A.* to *B.*, a variance in evidence as to the *termini* is fatal. *Tucker v. Cracklin*, 385
6. A carrier, who gives two notices limiting his responsibility, is bound by that which is least beneficial to himself. *Munn v. Baker and Another*, 255
7. In an action against a carrier for not taking care of and safely carrying goods according to his promise, it appears that he had limited his responsibility as a carrier, by means of a notice, of which the plaintiff was cognisant, the plaintiff having declared against the defendant as a carrier in the usual form, cannot insist that the goods were lost from the defendant's warehouse before the actual carriage of the goods commenced. *Roskell v. Waterhouse and Another*, 461

CHARTER-PARTY.

1. In an action by the owner against the freighter of a chartered ship for not supplying a cargo according to the terms of the charter-party, the freighter cannot insist upon the precise burthen stated in the charter-party. *Thomas v. Clarke and Todd*, Page 452
2. In an action for not supplying a cargo under a charter-party, according to the terms of which different articles of freight are to be paid for at different rates by weight, and the freighter is at liberty to supply which articles he pleases, an average value of freight, calculated upon the various rates of freight in the proportion of different articles usually carried on such a voyage, is the proper measure of damages. *Thomas v. Clarke and Todd*, 450

COMPOSITION.

1. *A.*, a creditor of *B.*, executes a composition deed, without specifying the amount of his demand, he thereby binds himself to the extent of his claim, although the terms of the deed are, to take the composition for the sums set opposite to the respective names of the creditors who execute the deed. *Harrhy v. Wall*, 195
2. If one creditor, by undertaking to discharge his debtor, induce another creditor to discharge that debtor on receiving a composition for his debt, he cannot afterwards recover from that debtor. *Wood v. Roberts*, 417

COMPETENCY.

See EVIDENCE.

CON-

CONSTABLE.

Semble. A constable is not justified in apprehending and imprisoning a person, on suspicion of having received stolen goods, on the mere assertion of one of the principal felons. *Isaacs v. Brand and Others*,
Page 167

COPYRIGHT.

See EVIDENCE.

Where an engraving has been made from a picture, it is not a piracy of the print for another artist to make another engraving from the original picture. *De Berenger v. Wheble*,
548

COVENANT.

1. The breaking a door-way through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, amounts to a breach of covenant to repair. *Doe dem. Vickery v. Jackson*,
293
2. A tenant of a house covenants to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, cannot remove a viranda erected during the term, the lower part of which is affixed to the ground by means of posts. *Administratrix of Penry v. Brown*,
403
3. A. binds himself under a penalty to indemnify B. against his obligation to C., if the money be not paid before a certain day. B., in an action on the bond for not indemnifying, is entitled to recover the amount of the penalty of the bond. *Wood v. Wade*,
167

CRIM. CON.

In an action for criminal conversation, proof that a letter produced corresponds, as to its contents, with a letter which the wife wrote to her husband, whilst she was absent from him, (before the criminal intercourse,) upon a visit at the house of a friend, and which she read over to the witness, is sufficient to warrant the reception of the letter in evidence, although no explanation is given of the cause of their living apart, there being no ground to suspect collusion. — The judgment which a witness forms from the conduct and expressions of the wife to her husband whilst she lives apart from him, as to her affection for him is evidence. *Trelawney v. Colman*,
Page 191

DECEIT.

1. The purchaser of a warranted but worthless watch, is entitled to maintain an action for deceit, although it is stipulated, that if he dislikes the watch, the vender shall exchange it for one of equal value. *Wallace v. Jarman*,
162
2. The vendor of a ship represents her to have been built in 1816, although in fact she has been launched a year earlier; the vendee is entitled to recover damages for the deceit, although the ship was to be taken with all faults. *Fletcher and Another v. Bowsher and Others*,
561

DEED.

1. On *non est factum* pleaded to a bond, it is not sufficient to prove the execution by a person who
s s s executed

executed in the name of the defendant without proof of identity. The agent of the defendant's attorney cannot be examined as to communications with the defendant on the subject of the action in order to prove his identity. Declarations made by the attorney of a party in conversation are not evidence against his client. *Parkins v. Hawkshaw*, Page 239

2. Upon *non est factum* pleaded to a bond for the performance of certain conditions, breaches of which are assigned in the declaration, the jury who try the issue may assess the damages under the common venire. *Parkins and Another v. Hawkshaw*, 381

3. The defendant cannot, under the plea of *non est factum* to a declaration upon a bond, go into evidence, to shew that the consideration was an illegal one at common law. There is no distinction in such case, between a specialty, which is avoided by a statute, and one which is void at common law. *Harmer v. Wright*, 35

4. It is not a breach of the bond of a broker in the city of London to act as a broker concurrently with another. *The Mayor, &c. of London v. Brandon*, 14

5. Upon the trial of an issue whether the date of an annuity deed has not been altered, the attesting witness must be called. *Edinburgh v. Crudell*, 284

EJECTMENT.

1. A defendant in ejectment, who has paid rent to the lessor of the plaintiff, may shew that his landlord, pending the term, sold his interest in the premises. *Doe dem. Lowden v. Watson*, 230

2. The plaintiff is entitled to recover in ejectment, although it appears that the defendant, who is in possession, is the mere servant of another by whose permission he entered into possession. *Doe dem. Cuff v. Stradling*, Page 187

3. A lessor in ejectment, who claims title as a purchaser from the sheriff who sells by virtue of a *fiery facias*, at the suit of such lessor, must prove the judgment as well as the writ. *Doe dem. Bland, v. Smith*, 199

4. After the plaintiff, in ejectment, has proved his title to a verdict, the Court will not try the question of the precise extent of the plaintiff's claim as defined by particular metes and bounds. *Doe on the demise of the Drapers' Company v. Wilson*, 477

EMBEZZLEMENT.

One who is employed at a yearly salary, under the appellation of accountant and treasurer to the overseers of a township, whose duty it is to receive all monies receivable or payable by them, is a clerk and servant within the stat. 39 G. 3. c. 85. *Rex v. Squire*, 349

EVIDENCE.

1. The prosecutrix of an indictment for an assault with intent to commit a rape, having been cross-examined as to crimes committed by her several years before the alleged offence, evidence may be adduced to shew that her character has since been good. — The fact of her making complaint of the outrage, and the state in which she was at the time of making the complaint are evidence, although the particulars of her statement are

- are not evidence to prove the truth of her statement. — The defendant in such case may impeach her character for chastity, by general, but not by particular evidence. *Rex v. Clarke*, Page 241
2. Upon the trial of *A.*, *B.* and *C.* for a conspiracy, where after the case on the part of the prosecution is closed, *C.* only calls witnesses and examines as to a conversation between himself and *A.*, the counsel for the crown may cross-examine such witnesses as to any other conversation between *A.* and *C.* although the evidence tend chiefly to criminate *A.* *Rex v. Kroehl and Others*, 343
3. Evidence of a particular collateral fact cannot be adduced in any case, whether civil or criminal, in order to discredit a witness. — The only modes of impeaching the credit of a witness, are by cross-examination, by producing the record of his conviction of some crime, or by adducing general evidence that he is unworthy of being believed upon his oath. — If a witness be asked as to a collateral fact his answer is conclusive. *Rex v. Watson*, 149
4. In an action against a certificated conveyancer for negligence in managing the purchase of an annuity for the plaintiff, a joint purchaser is a competent witness for the plaintiff. *Rothery v. Howard*, 68
5. One who has been mortgagee of certain premises afterwards takes a conveyance in fee-simple, in which the same premises are described as unincumbered, from a vendee of the mortgagor; this, in the absence of fraud, is conclusive evidence to shew that the amount of the first mortgage was paid. *Jones v. Williams*, 52
6. Assumpsit against several as partners, the question of partnership being doubtful upon the plaintiff's evidence, the defendants go into their case; and in order to render a witness competent produce a release executed by all of them; this instrument is to be considered as in evidence for all purposes. *Gibbons v. Wilcox, Oberry, and Another*, Page 43
7. The defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents or written documents, although notice has been given to the plaintiff to produce them and he refuses to produce them in that stage of the cause. *Sideways v. Dyson and Another*, 49
8. In an action by *A.* against *B.* for falsely representing *C.* as trustworthy, in consequence of which *A.* gave credit to *C.*, the latter is a competent witness. *Smith v. Harris*, 47
9. In an action of tort against a minor for the negligence of his agent, (*semble*) his guardian cannot render the agent competent by releasing him. *Fraser v. Marsh*, 41
10. A defendant who has worked coal-mines without interruption, in pursuance of an agreement with the owner, cannot, upon the trial of an action against him for a breach of the agreement, compel a third person to produce his title-deeds, by virtue of which he is entitled to the legal estate in which the premises are situated, as a trustee. *Roberts v. Simpson*, 203
11. Upon the question whether *A.*, after executing a conveyance of property to trustees for the benefit of his wife, had the disposition of the property, evidence of his making

- ing an assignment of it, is not admissible against the trustees, unless they were privy to it, or unless the property was delivered, and the assignment acted upon. — *Semble*, a letter written by an attorney to his client, and produced with the client's signature indorsed upon it, is evidence against the client. — Where the question is as to the solvency of a party at a particular time, the general result as collected from sufficient sources may be given in evidence. — And *Semble*, the accounts rendered by a bankrupt of his affairs to the commissioners are competent sources. *Meyer v. Sefton and Others*, Page 274
12. In order to warrant the admission of a deposition of the deceased against the prisoner, on an indictment for murder, it is not necessary that the prisoner should have been present the whole of the time during which the deposition was taken, the deponent having been re-sworn in the presence of the prisoner, and the part of the deposition, which had already been taken, having been read over to the prisoner and sworn by the deponent to be true. *Rex v. Smith*, 208
13. The opinion of one conversant in the business of insurance, as a matter of judgment, whether the communication of particular facts would have enhanced the premium is admissible evidence; but he cannot be asked what he himself would have done in the particular case. *Berthon and Another v. Loughman*, 258
14. A copy of a judgment in the Supreme Court of *Jamaica*, made by the chief clerk of the court, is not receivable in evidence here, although it appears that such copies are usually received as evidence in the island of *Jamaica*. *Appleton v. Lord Braybrook*, Page 6
15. Evidence that the plaintiff, in an action for pirating a musical work, acquiesced in the defendant's publication of it six years ago, does not prove that the plaintiff has transferred his interest in the copyright. — A receipt given by the plaintiff for money received by him as the price of the copyright, will not preclude the plaintiff from maintaining the action. *Latour v. Bland and Another*, 382
16. Evidence that the son of the defendant, a minor, has in three or four instances signed bills of exchange for his father, is sufficient, in an action against the father on a guarantee, to warrant the reading of an instrument, purporting to be a guarantee by the father in the hand-writing of the son. *Watkins v. Vince*, 368
17. In trespass *q. c. f.* the defence is, that *M. P.* was the owner of the *locus in quo*, and that the defendant entered, by the direction of *M. P.*, a declaration by *M. P.* made subsequent to the act complained of is inadmissible. *Garr and Another v. Fletcher*, 71
18. A great number of placards announcing a public meeting in *Spa Fields* having been printed, the prisoner takes twenty-five of them away from the printer's, one of the remaining placards may be read without any preparatory evidence as to the original manuscript, and without notice to the prisoner to produce the twenty-five copies. *Rex v. Watson*, 129
19. In order to identify a person in court with one whom the witness has described, the attention of the witness

- witness may be directed to the person in court, and he may be asked whether that is the person of whom he has spoken. *Rex v. Watson*, Page 128
20. Papers found in the lodgings of a co-conspirator at a period subsequent to the apprehension of the prisoner may be read in evidence, although no *absolute proof* be given of their previous existence, where strong presumption exists that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers are intimately connected with the objects of the conspiracy as detailed in evidence. *Rex v. Watson*, 140
21. A witness for the Crown cannot, on cross-examination, be compelled to state through what channel he made a disclosure to government, either immediately or mediately. *Rex v. Watson*, Page 135
22. In an action by one defendant in assumpsit against a co-defendant, the *postea* is evidence to prove the amount of the damages; but (*semble*) the indorsement of the costs, with the master's *allocatur* on the *postea*, is not sufficient to entitle the plaintiff to recover half of the costs, without producing the judgment. *Foster v. Compton*, 364
23. In treason and felony, evidence may be given of the finding articles secreted, although they were found at a time subsequent to the prisoners' apprehension. *Rex v. Watson*, 137
24. Where a minor sues by his guardian, the declaration of the guardian is not evidence against the plaintiff. *Cowling v. Ely*, 366
25. The evidence which a person has given before a committee of the House of Commons, is afterwards admissible against him on a criminal charge. *Rex v. Mercer*, Page 366
26. As against the master of a vessel in an action for not safely conveying goods to a foreign port consigned to the plaintiffs, evidence that the goods were seized in another foreign port by the government coupled with a letter of the defendants, in which he acknowledges that he is accountable for the goods, is sufficient to warrant the jury in finding for the plaintiffs without any further proof of the cause of seizure. — Variance. *Cullen and Another v. Mac Alpine*, 552
27. The presumption is, that the waste land which adjoins to a road, belongs to the owner of the adjoining freehold, and not to the lord of the manor.—General evidence of title to such wastes: *Semble*, reputation alone is *admissible* evidence to prove the existence of a manor without any proof of the actual exercise of any manorial right. *Steel v. Prickett and Others*, 463
28. A witness having been called into the box and sworn in the course of a prosecution for a misdemeanor, produces a document, but is not examined. The defendant is entitled to cross-examine. *Rex v. Brooke*, 472
29. In order to prove the order of the Insolvent Debtor's Court for the discharge of a debtor, it is not sufficient to produce and prove the order to the marshal for the discharge of the debtor, reciting the judgment. The original entry of the judgment by the Court ought to be produced. *Doe on the demise of Robinson v. Barton*, 473
30. An entry by A. at the Excise-office,

office, of premises for the keeping of beer for home consumption and exportation, in the name of himself, *B. and C.*, is conclusive against *A.* as far as regards the crown, but is not conclusive with respect to other parties. *Ellis and Another v. Watson and two Others*,
Page 478

EXECUTION.

Although *A.* cohabits with *B.*, and assumes his name and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture, being her property, is not liable to be taken under an execution against *B.* *Edwards v. Bridges and Another*, 396

EXECUTOR.

See ADMINISTRATOR.

FELONY.

1. The horse-mail bags being left by the mail rider, after he had taken possession of them, for a temporary purpose for two minutes, were stolen during his absence, the case is within the stat. 52 G. 3. c. 143. § 3. *Rex v. Robinson*, 485
2. After the examination of a prisoner before a magistrate, upon a charge of felony has been taken by the magistrate's clerk, it is read over to him, and he is told that he may sign it or not, as he chooses; having declined to sign it, the examination cannot be read in evidence. *Rex v. Telicote*. 483

FOREIGN JUDGMENT.

See EVIDENCE.

FOREIGN SENTENCE.

See EVIDENCE.

FORM OF ACTION.

See TRESPASS.

FRAUDS, STATUTE OF.

1. The defendant being tenant to the plaintiff of certain rooms in his house, at a rent payable quarterly, a mere parol agreement in the middle of a quarter to determine the tenancy is not binding. *Thomson v. Wilson*, Page 379
2. A landlord having authorised a distress for rent, is liable for the necessary expenses, and although the plaintiff was sent by the defendant to take possession of the goods distrained, who promised to pay him, the latter will not be liable without a note in writing. *Colman v. Eyles*, 62

GOODS SOLD.

Proof that the plaintiff sent goods to the defendant, resident in a foreign country, upon the order of merchants residing in *London*, and that the defendant received and used the goods, is *prima facie* evidence of goods sold and delivered to the defendant. *Bennett and Another v. Henderson*, 550

GUARANTEE.

1. A guarantee for the payment of goods, supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. *Simmons and Others v. Keating*, 426
2. The

2. The defendant agrees to guarantee the plaintiff against any loss in case his son shall become bankrupt, and alleges in his declaration that his son has become a bankrupt, he is bound to shew that a commission of bankrupt has been sued out. *Bulkeley v. Lord*, Page 406
3. In an action on a guarantee, the plaintiff gives in evidence a letter in the hand-writing of the defendant, but without date, in which the latter states, "I have no objection to guarantee the payment of the rent, as far as that of each quarter, during Mr. T. Want's continuance in possession." He also proves that T. Want rented certain premises from him. This is not sufficient, without shewing that the plaintiff accepted the defendant's offer. *Symmons v. Want*, 871

HORSE.

- Roaring constitutes unsoundness in a horse. *Onslow v. Eames*, 81

HUNDRED.

1. A house, part of which is occupied by the plaintiff as a shop, and the remainder of which is occupied by lodgers, no part of his family sleeping therein, is a dwelling-house, within the protection of the stat. 1 G. 1. st. 2. c. 5. *Rea v. Wood and Another*, 269
2. If a mob attack a house with intent to liberate a person in custody in that house, or to pull the house down in case he be not delivered up, and proceed to acts of violence, this is a sufficient beginning to demolish, as far as intention goes, to entitle the owner to his remedy against the hundred, under

- the stat. 1 G. 1. st. 2. c. 5. — Damages may be recovered in respect of guns found in the house, and used and damaged in the course of demolition. — But not in respect of guns stolen by the mob. *Beckwith v. Wood and Another*, Page 263
3. In an action against the hundred, on the stat., to recover damages for mischief done to a dwelling-house by a mob, it is not necessary to shew, that the object of the mob was seditious. *Clarke v. Burdett, Bart. and Another*, 504

INDICTMENT.

1. Form of an indictment against workmen for a conspiracy against their employers. *Rex v. Ferguson and Edge*, 489
2. The court of *Nisi Prius* will not notice objections to an indictment upon the trial, which fully appear on the record. *Rex v. Souter*, 423
3. An indictment for a misdemeanor, containing several counts, alleging several misdemeanors of the same kind on the same day, the prosecutor may give evidence of such misdemeanors on different days. *Rex v. Levy and Others*, 458

INFANT.

1. An account stated by an infant is not evidence after he attains his age, even to shew that he has been supplied with the necessaries mentioned in the account. *Ingledeu v. Douglas*, 36
2. Where a minor orders articles which are necessary and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given to

to that effect by the father. *Baker v. Keen*, Page 501

LANDLORD AND TENANT.

1. *A.*, by parol, lets a house to *B.*, who underlets to *C.* *A.*, with *B.*'s assent, accepts *C.* as his tenant, and receives rent from him; *A.* cannot afterwards recover against *B.*, since the privity of estate is destroyed. *Thomas v. Cooke*, 408
2. *Semble.* An agreement between a landlord and a tenant from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, determines the tenancy of the first tenant. *Stone v. Whiting*, 235
3. A landlord, under a covenant in a lease to pay the land-tax, is bound to pay the land-tax in proportion to the *quantum* of rent only. *Whitfield v. Brandwood*, 440

LIBEL.

1. Under the plea of not guilty to a declaration for a libel, the plaintiff, cannot go into evidence to shew that the allegations in the libel are false.

Neither can he give in evidence subsequent declarations by the defendant, where the intention of the publication is not equivocal.

The editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper. *Stuart v. Lovell*, 93

2. An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt is libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose

of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. *Brown v. Croome*, Page 297

3. Action for a libel contained in a letter written by the defendant to the plaintiff; proof that the defendant knew that the letters sent to the plaintiff, were usually opened by his clerk, is evidence to go to the jury of the defendant's intention that the letter should be read by a third person. *Delacroix v. Thevenot*, 63
4. An indictment for a libel reflecting upon the prosecutor in his profession as a solicitor, and which has been sent to the prosecutor only, ought to be alleged to have been sent with intent to provoke and excite the prosecutor to a breach of the peace, and should not be alleged with intent to injure the prosecutor in his profession. *Rex v. Wegenor*, 245

LIEN.

- A.* sells to *B.* a carriage, to be paid for partly by a bill upon the delivery, and partly by a bill at a future day, and *B.* neglecting to take the carriage, *A.* obtains a verdict against him for goods bargained and sold. Until the amount is paid to *A.*, he has a lien upon the carriage, and the sheriff cannot seize it under a *fi. fa.* against the goods of *B.* *Houlditch and Another v. Desanges and Another*, 337

LIMITATIONS, STATUTE OF.

1. A promise by a defendant to pay a debt by instalments, when he is able, is sufficient to take a case out of the statute of limitations without

out proof of time being given, or of the ability of the party. *Thompson v. Osborne*, Page 98

2. A debtor executes a warrant of attorney to his creditor to confess judgment for the balance of account as then stated between them. The warrant of attorney is not a specialty, which takes the case out of the statute of limitations. *Clarke v. Figes*, 234
3. By the demise of a messuage with all rooms and chambers thereto belonging and appertaining, is to be understood all that is occupied together, as the entire messuage at one and the same time. And therefore such a demise will not comprehend a room, which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previous to the demise. *Kerslake v. White*, 508

MALICIOUS STABBING.

In order to make the killing a bailiff, in resisting the execution of mesne process in a civil action, amount to murder, it seems to be necessary to prove the writ as well as the sheriff's warrant to the bailiff.— And such homicide will not amount to murder, if the bailiff attempt to execute a writ without a *non omittas* clause within an exclusive liberty. *Rex v. Mead and Another*, 205

NEGLIGENCE.

The owner of a barge upon the Thames lends it to another, who navigates it with his own men, who are guilty of negligence, in conse-

quence of which mischief is done: (*semble*), the owner is not liable. *Scott v. Scott and Others*, Page 438

NOTICE TO PRODUCE.

A., as surety for *B.*, binds himself to pay to *C.* the balance of account between *B.* and *C.* within the space of six months after notice. In an action by *C.* against *A.*, parol evidence of such notice cannot be given without proof of the usual notice to produce it. *Grove and Another v. Ware*, 174

NUISANCE.

A corporation being the conservators of a river, and owners of the soil between high and low water mark, cannot authorise a lessee to erect a wharf there, which produces inconvenience to the public in the use of the river for the purposes of navigation. *Rex v. Lord Grosvenor and Others*, 511

PARTNERS.

1. After the dissolution of partnership between *A.* and *B.*, and the advertisement of it in the Gazette, *A.* accepts a bill, bearing a date previous to the dissolution for the accommodation of a third person who indorses it for value, *B.* who permits his name to remain over the shop in the Poultry, as a member of the firm till after the dissolution of partnership and notice of it, and indorsement of the bill, is liable as a partner to a *bonâ fide* holder. *Williams and Another v. Keats and Archer*, 290
2. One co-partner cannot bind another by drawing a bill in the name of the firm for the discharge of his

his own private debt, without the knowledge of his co-partner; and this defence may be set up by the latter in an action by the indorsee of the bill, without giving any notice of his intention to dispute the consideration. *Green v. Deakin and Others*, Page 347

3. Upon the dissolution of partnership between the plaintiffs *A.* and *B.* it is agreed that the joint debts shall be received by *C.*, an agent appointed by both, for the discharge of their joint debts. The defendant accedes to this arrangement; but afterwards *A.* countermands the authority to *C.* and demands the debt from the defendant, which he pays; *A.* and *B.* cannot afterwards maintain an action for the debt. *Bristow and Porter v. Taylor*, 50

4. One of several partners, as brewers, transfers the premises to *A.*, who buys books and carries on the same business there; the other partners are not entitled to the possession of these books, the contents of which do not relate to any entries anterior to *A.*'s entry. *Dore v. Wilkinson and Spurvey*, 287

5. The plaintiff holding a bill of exchange as a security from three partners after the dissolution of the co-partnership, and after the bankruptcy of one of them, takes the notes of one of them as a collateral security without the knowledge of the other partners, and retains the original security in his hands, this does not discharge the other partners. *Bedford v. Deakin and Others*, 178

6. If a partner who executes a charter-party by the terms of the instrument, in the commencement of it, professes to contract for himself and his partner *A.*, *A.* will be

bound although all the stipulations and obligations in the remaining part of instrument are made in the name of the said *freighter*. *Thomas v. Clarke and Todd*, Page 451

7. Where goods are ordered by one member of a club for the benefit of all, every member, who either concurs in the order or subsequently assents to it, is liable, although the member who ordered the goods is made the debtor in the plaintiff's books and the bill is sent to him, unless it clearly appear that the plaintiff meant to give credit to that member only. *Delauney v. Strickland*, 416

And see EVIDENCE.

PATENT.

A brush differing from a common one in no other respect than in the circumstance that the hairs or bristles are purposely made of unequal lengths, is improperly described in a patent for a new invention as a tapering brush. *Rex v. Metcalf*, 249

PAYMENT OF MONEY INTO COURT.

1. *A.* having a legal claim against *B.* on bills of exchange accepted by *B.*, and having also possession of a deed of mortgage, executed by *B.* to a third person, of which he might compel an assignment in equity; *B.* pays money to *A.* on account, without prejudice to his claim on any securities. The law applies the payment to the bills of exchange. *Birch and Another v. Tebbutt*, 74

2. Goods

2. Goods having been sold to the defendant by sample, at a stipulated price, he cannot, after payment of money into court, in an action of *indebitatus assumpsit*, insist upon any defect in the goods, since by the payment of money into court, he admits the original contract. If a purchaser mean to insist on such an objection, he ought to return the goods. *Leggett v. Cooper*, Page 103

POLICY.

1. After a total loss and adjustment within a month, and whilst the policy remains in the hands of the broker, the initials of the insurer are struck out of the adjustment to indicate payment, and the broker debits the insurer with the loss; the insurer is still liable to the assured. *Fell v. Pratt*, 67
3. A policy of insurance from *Calmar* to *Portsmouth* is altered with the consent of some of the underwriters, by inserting the words *or Weymouth* after *Portsmouth*, the plaintiff cannot recover on the altered policy against an underwriter, who was ignorant of the alteration when it was made, even although upon being informed of the alteration, he said that he would not take advantage of it. *Campbell v. Christie*, 64
3. An action cannot be maintained on a policy of insurance, where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade. *Everth v. Blackburne*, 66
4. Insurance on freight on a voyage from *A.* to *B.*; a second insurance on freight valued at 10,000*l.* on a voyage from *A.* to *B.*, and thence to *C.*, with a memorandum that if

the ship should be lost at *B.*, a settlement should be made as if she had had on board an entire freight to *C.* The ship earns freight to the amount of 2500*l.* on her voyage from *A.* to *B.*, and is lost at *B.*, the assured cannot recover for a greater loss than 7500*l.* *Robertson v. Marjoribanks*, Page 573

POOR'S RATE.

One who occupies a house as surveyor to the navigation of the river *Lee*, under the trustees of that river, held to be liable for poor's rates, although by act of parliament the tolls, &c. are exempted from being rated, and although the trustees have no beneficial interest, but act for the public.
 ——— *v. Armstrong and Others*, 543

PRACTICE.

1. Where the declaration contained thirty counts on fifteen bills of exchange, the Court at *Nisi Prius* refused to compel the plaintiff to select fifteen of the counts on which to take his verdict. *Ferguson and Others v. Clarke*, 442
2. After a plaintiff in the course of a cause has submitted to be nonsuited, the counsel for the defendant cannot put any further question to a witness. *Jones v. Hall*, 505
3. Practice as to the opening and replying of counsel in trespass. *Jackson v. Hesketh*, 518

PRINCIPAL AND AGENT.

1. A proctor may recover for business done for the defendant by his clerk, although the defendant apprehended that the clerk was the prin-

principal, he acting as the principal, and never disclosing the name of his employer, provided no prejudice arises to the defendant from the concealment. — An agreement between a proctor and his clerk, to pay the latter a salary amounting to half the annual average profits of the last three years, is not an evasion of the statute. *Grojan v. Wade*, Page 443

2. If a vessel be so shattered by a storm that in the opinion of the master, who exercises a fair and honest discretion on the subject, she cannot, without imminent peril to the lives of the crew, proceed on her voyage, and cannot be repaired but at an expense exceeding the amount of a total loss, and he accordingly abandons and sells her, the owner may recover from the insurer as for a total loss, although it eventually turns out to be possible that the vessel might have proceeded. *Robertson v. Caruthers*, 571

SEAMAN'S WAGES.

A seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port, and the delivery of her cargo: Held, that although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, and which he had offered to pay him. *White v. Mattison*, 325

SHERIFF.

1. The return purporting to be made by a lord of a manor to the

sheriff's mandate to levy under a writ of *fieri facias*, is *prima facie* evidence that the person whose return it purports to be is the lord of the manor. — Evidence that the person who actually made the return, has acted as bailiff to the lord of the manor for sixteen years, and during that time has made the returns for the lord of the manor, is sufficient to charge the lord of the manor with the acts of the bailiff. — In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud. — In an action against the sheriff for not selling the joint property of *A.* and *B.*, under an execution against the goods of *A.*, (*semble*) half the value of the goods is the proper measure of damages. *Tyler v. Duke of Leeds*, Page 218

2. Proof of a copy of a bailable writ, with the name of a sheriff's officer indorsed upon it, is not evidence that the sheriff appointed that officer to execute the writ. — If a party in a cause be under the necessity of calling his real adversary in the cause, (who is not a party on record) although for the purpose of formal proof only, he makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. — *A.* gives credit to *B. C.*, who represents himself to be *D. C.*, and sues out a writ against *D. C.*, under which *B. C.* is arrested, the sheriff would be justified in detaining *B. C.*, but is not bound to do it. *Morgan v. Brydges and Another*, 314
3. In an action against the sheriff, in order to connect him with the act of his bailiff, it is sufficient to produce

duce the writ, with the name of the bailiff indorsed upon it, in the sheriff's office; it being the course in the sheriff's office to indorse upon the writ the name of the bailiff by whom it is to be executed. *Tealby v. Gascoigne*,
Page 202

4. In an action against the sheriff for an escape on mesne process, a copy of the writ is given in evidence by the plaintiff, and the document contains also a copy of the sheriff's return, the defendant is not entitled to have the copy of the return read as part of the document. — In such an action, the sheriff's return of a rescue is not conclusive. *Adey v. Bridges and Another*, 189
5. In an action against the sheriff for an escape on mesne process, an admission by the defendant in the former action, as to his liability, is evidence against the sheriff. *Williams v. Bridges and Another*, 42

SHIP.

1. A managing owner and part owner of a ship cannot bind another part owner by effecting an insurance on the ship without his authority. *Bell v. Humphries and Others*, 345
2. A factor for the owner of a ship at an English port requests the master to deliver the certificate of registry to him, in order that he may pay the tonnage duties at the Custom-house. He cannot, having thus obtained possession of the certificate, retain it as a security for the general balance due to him as factor, in respect of the ship. *Burn and Another v. Brown and Another*, 272

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3. In an action against the owner of a ship, for money supplied to the captain at a foreign port, it is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of part of that sum to such uses, and that the residue was placed to the private account of the captain. It is essential to prove the advance of a specific sum, that it was necessary for the use of the ship, and that it was so applied in fact. *Palmer and Others v. Gooch*, Page 428

4. A contract is entered into for the sale of a ship, and a quantity of iron kintlage, for the sum of 1600*l*. but eventually a bill of sale is executed of the ship, together with all her stores, &c. in the usual form. In an action of assumpsit on the sale of the ship and kintlage, for the non-delivery of the kintlage, the bill of sale is the only contract that can be considered as obligatory on the parties, and the plaintiff cannot recover. *Lano v. Neale*, 105

5. A captain of a ship is not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale of the goods is the most beneficial course for the owner. *Wilson v. Millar and Others*, 1

SLANDER.

1. In an action for slander it is alleged, that the words were spoken of and concerning certain soap, alleged by *A. B.* to have been stolen. The declaration is not supported by evidence that the words were
T T spoken

spoken concerning certain soap alleged by *A. B.* to have been taken out of his yard. *Shepherd v. Bliss and his Wife*, Page 510

2. In an action for slander, words are given in evidence in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words. *Warne v. Chadwell*, 457

SPECIAL JURY.

If a defendant who has obtained and served a rule for a special jury, take no further steps upon it, the plaintiff will be entitled to have the cause tried in its regular order, as a common jury cause, and the Court will not afterwards relieve the defendant, except under very special circumstances. *Farrer and Another v. Richards and Another*, 369

STAGE COACHES.

A parcel delivered to the driver of a stage coach, to be carried is lost, the master and not the servant is responsible. *Williams v. Cranston*, 82

STAMP.

1. After breach of a contract for the sale and delivery of goods, the defendant enters into a fresh agreement in writing, to cancel the former agreement; and for the future sale of goods upon different terms, the second agreement relates to the sale of goods, and does not require an agreement stamp.

Whitworth v. Crockett and Another, Page 431

2. Where the agreement on which the action is brought, is contained in a prospectus of terms delivered by the plaintiff to the defendant, it is necessary to get that identical copy stamped, which has been delivered, and it is not sufficient to get another copy stamped. *Williams v. Stoughton*, 292
3. A letter read to prove a contract of marriage need not be stamped. *Orford v. Cole*, 351
4. A surgeon and apothecary having agreed with a father to take his son as an apprentice in consideration of a premium, after the son has served for seven months, the agreement is broken off on account of the refusal of the former to pay the expence of the stamp for the indentures. The master cannot recover damages for breach of the agreement; nor can he recover as for the board and lodging of the son. *Keene v. Parsons*, 506
5. The value of a stamp upon a bill of exchange, under the statute 35 G. 3. c. 184. sched. tit. Bill of Exchange, depends upon the date upon the face of the bill. *Pedcock v. Murrell*, 558
6. In an action for work and labour, a proposal on the part of the defendant, which was not finally acceded to, containing an estimate of the amount of the work, may be read in evidence by the defendant, although it be not stamped. *Penniford v. Hamilton*, 475

SURETY.

Security having been given by a surety for goods to be supplied to his

5. An officer of the *Tower* not permitted to prove that a particular plan of the *Tower*, produced by the defendant is a correct one.

Rev. v. Watson. Page 148

TRESPASS.

1. *A.*, executes a warrant of attorney to *B.* to enter up judgment and take out execution, with a defeasance on payment of a certain sum of money. *B.*, after payment of this money, enters up judgment and takes *A.* in execution. *A.* moves the Court to set aside the judgment and execution, and after a rule *nisi* has been obtained, the whole is referred to a barrister, who awards that nothing was due to *B.* when he entered up the judgment, and that the judgment and warrant of attorney shall be set aside. *A.*, in an action of trespass and false imprisonment against *B.*, who pleads the general issue only, is entitled to recover. *Rogers v. Popkin,* 404
2. Commissioners of bankrupt make a warrant for the commitment of a bankrupt for refusing to be examined, the bankrupt being already confined in the King's-bench under previous process, (*semble*) the issuing of the warrant by the commissioners does not amount to an imprisonment by them, till the warrant is in some way operative to the detention of the party independently of the other process. But if the warrant operate to the confinement of the party within narrower bounds, it is an imprisonment by the commissioners. *Crowley v. Impey and Others,* 261
3. In an action, for throwing poisoned
T T 2 barley

barley upon the plaintiff's premises, in order to poison his poultry, the jury are not confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant. *Sears v. Lyons*, Page 317

4. In an action of trespass, where the general issue is pleaded, and also special pleas are pleaded, alleging a clandestine removal to avoid a distress, the plaintiff ought to go into the whole of his case in the first instance. *Rees v. Smith and Others*, 31

5. In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to shew that the plaintiff's character was suspicious, and that his house had been searched on former occasions. *Newsam v. Carr*, 69

6. In an action against the captain of an East-Indiaman, for assaulting a gunner's-mate a-board the ship, and causing him to be flogged, it is not competent to the plaintiff to give evidence as to his family and connections, unless they were known to the defendant at the time. *Rhodes v. Leach*, 516

TROVER.

1. Proof that the defendant in trover stated that he sold the property in question on the plaintiff's account is not *prima facie* evidence of a conversion. *English v. Charters*, 30

2. The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion; and so is the auctioneer who refuses to deliver it up unless the expence incurred

be first paid. *Loeschman v. Machin*, Page 311

3. An order for the payment of prize money, under the statute 49 G. 3. c. 123. s. 13. where the certificate required by the statute is signed in blank by the officers of the ship on board of which the seaman is serving, and the date is inserted at a subsequent period is irregular. And *semble*, damages cannot be recovered for the detention of such an order, by an assignee, for a valuable consideration, who describes it in the declaration, as an order for the payment of money. *Neck v. Dougan*, 246

4. *A.*, by the direction of *B.*, purchases coffee for *B.*, which is to be delivered at *Leghorn*, to *B.*'s order. The coffee is accordingly sent to *Leghorn*, and is sold there by *A.*'s agents, and by his direction. *B.* may maintain trover against *A.* for the conversion of the coffee, although the price has not been actually tendered to *A.* *Payne v. Brander*, 568

USE AND OCCUPATION.

1. Several persons rent premises to be used as a Jewish synagogue, the seats in which are let out by an officer appointed annually, who receives the rents and applies them partly in the payment of the rent for the premises, and partly for general purposes connected with the Jewish religion, the lessees may maintain an action for the rent due from an occupier of a seat. A Jewish synagogue is not an illegal establishment. — In an action by a surviving owner for use and occupation of premises, it is not sufficient

ficient to allege that the defendant held the premises by the sufferance and permission of the surviving owner only, where they were in fact held under two jointly. *Israel and Others v. Simmons*, Page 356

2. *A.* having an equitable title to a house, under an agreement for the lease of it, permits his mistress to occupy it, it is afterwards agreed between them that she shall take up the bills which he has accepted in part payment of the purchase-money, and that the lease shall be assigned to her; she remains in possession and does not take up the bills, and marries the defendant, who occupies the house, *A.* cannot recover against the defendant for use and occupation, *Keating v. Bulkely*, 419

USURY.

A party cannot recover on a new instrument which operates as a security for any usurious interest, although it is founded upon a new settlement of the account between the borrower and the lender, and the original securities have been cancelled. *Preston v. Jackson*, 237

VARIANCE.

1. A declaration, alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery.

A carrier's receipt for goods is evidence of the contract between

himself and the owner. *Samuel v. Darch and Others*, Page 60

2. See the last marginal note. Action on judgment for the non-performance of certain promises and undertakings. From the record in the former action it appears that the judgment was for the non-performance of one promise only. *Qu.* Whether this is a fatal variance. *Black v. Lord Braybrook*, 7
3. An introductory description in the declaration by the plaintiffs, the payees of a bill of exchange, in an action against the acceptor, representing them as the executors and trustees of a person deceased, is mere surplusage, and does not require proof, the bill being in fact payable to them in the name of a firm which they had assumed. *Aguttar and Another v. Moses*, 499
4. In an action on the case for exhibiting an inscription opposite to the plaintiff's house, insinuating that it was a house of ill-fame, a prefatory allegation that the plaintiff carried on the business of a retailer of wines there, may be rejected as surplusage, there being no allegation that the publication was of and concerning the plaintiff as such retailer of wines. *Spall v. Massey and Others*, 559

VENDOR AND VENDEE.

1. Goods are delivered to a bailee on a contract of a sale and return, the bailee has no authority to pledge the goods. — Application of the stat. 21 J. 1. c. 19. § 10. to such a case. *Delauney v. Barker*. 539
2. The purchaser of an annuity by the *Waterloo-bridge* company, which

which is described as well secured, and payable out of the first tolls received, and is not described as a redeemable annuity, cannot afterwards object to the completion of the purchase, on the ground of misdescription, provided the annuity has been granted in conformity with the act. *Coverley v. Burrell*, Page 295

8. A vendee at *Aberystwith* gives an order for goods to the traveller of the plaintiff, who is a dealer in *London*; nothing is said about the mode of carriage, it is to be presumed that the goods are to be sent in the most usual and convenient way, and therefore upon the delivery of the goods to a carrier in *London*, a cause of action arises in *London*. *Copeland v. Lewis*, 33

9. A complaint having been made to a magistrate by A. the owner, that his horse has been stolen by B.; an officer although armed with a warrant against A. is not justified under the st. 31 *Eliz. c. 12. § 4.* in taking the horse out of the possession of a bona fide purchaser from B. *Josephs v. Atkins*, 76

VENUE.

A constable who imprisons a person on suspicion of felony without any reasonable grounds, of his own authority, without any warrant or charge from any other person, is within the stat. 21 *J. 1. c. 12.* which requires the venue to be laid in the proper county. — If a private person act in such case in aid of the constable, and upon his command, he also is within the statute; otherwise, if he be the prime mover and

act as a principal in the transaction. *Staight v. Gee and Garver*. Page 445

VOTE.

See ACTION ON THE CASE.

WITNESS.

1. A witness on examination on the *voir dire*, acknowledges that he has entered into a contract, (the effect of which is to render him incompetent,) at the same time he produces the written contract itself, this ought to be read. — A bankrupt after an act of bankruptcy, contracts with a factor to whom he has delivered goods for sale, and who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, and does return the bill, the assignees may adopt this contract and recover against the factor, for the non-delivery of the goods. *Butler and Another v. Carver and Another*, 433
2. Upon a plea in abatement, that the promises were made jointly with A. B. and others, A. B. is a competent witness for the plaintiff. *Cosham v. Goldney and Another*, 414
3. Upon an issue to try whether an act of bankruptcy has been committed, a creditor is incompetent as a witness, although he has not proved under the commission. — *Qu.* whether a commissioner under the commission is a competent witness to prove the bankruptcy. *Crooke v. Edwards*, 302
4. The owner of landed property within a chapelry is not a competent witness to relieve the inhabitants

bitants of the chapelry from the permanent burthen of repairing the parish church, although the witness does not reside within the chapelry, and his lessee for years of his estate within the chapelry is bound to pay all rates. *Rhodes and Another v. Ainsworth*, Page 215

3. A record of a conviction of felony,

without a caption, is not admissible in evidence to incapacitate a witness. — When the directions which have been given by a defendant to his agent cannot be read on the ground of public policy, the agent may be asked whether he did not act under the direction of the defendant. *Coke v. Maxwell*, 183

END OF THE SECOND VOLUME.

